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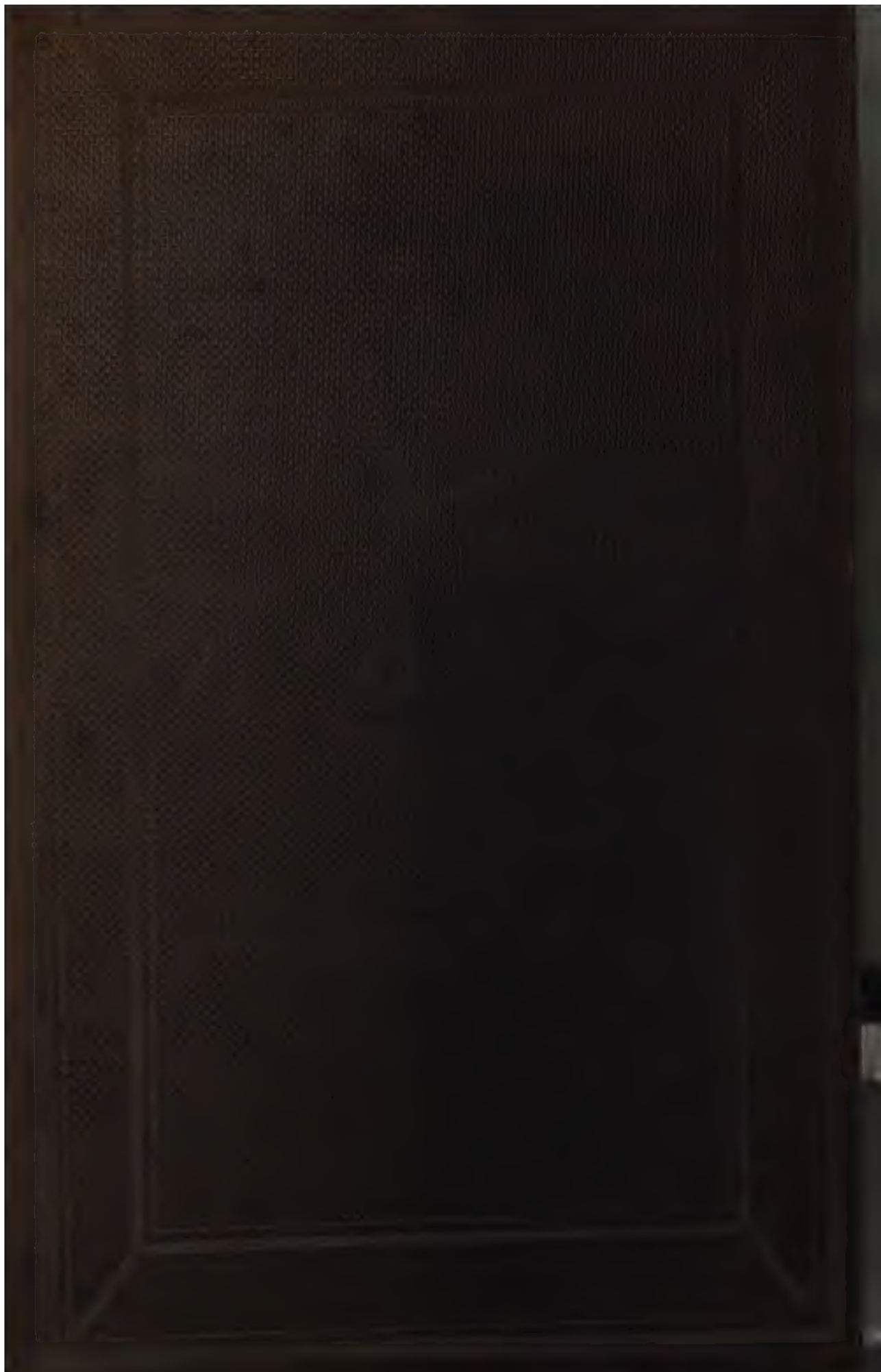
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A TREATISE
ON THE
LAW OF BILLS OF EXCHANGE.



A TREATISE
ON THE
LAW OF BILLS OF EXCHANGE,
PROMISSORY-NOTES, BANK-NOTES,
AND CHECKS ON BANKERS.



BY
ROBERT THOMSON,
ADVOCATE.

A NEW EDITION,
ADAPTED TO THE PRESENT STATE OF THE LAW,

BY
JOHN DOVE WILSON,
ADVOCATE.

EDINBURGH:
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ADVERTISEMENT TO THE PRESENT EDITION.

IN preparing a new edition of Mr Thomson's Treatise on Bills of Exchange, it has been found necessary to make considerable changes on the original work, in order to present a clear view of the law as it at present stands.

During the interval of twenty-nine years, which has elapsed since the publication of the former edition of Mr Thomson's Treatise, considerable portions of it have become obsolete. It contained numerous dissertations on points of law, then open, which have since been decided; and it contained much that has become obsolete by the operation of the Mercantile Amendment Act, and other important recent statutes. To have reprinted the portions thus rendered obsolete, in addition to all the new matter requisite to explain the law that has come in their place, would have made the present edition unnecessarily large, as well as unnecessarily inconvenient to consult. All the obsolete portions of Mr Thomson's work have therefore been omitted. For other reasons, it was necessary to omit other portions. In some instances there was a needless encumbrance of the work with the details of decisions, long since admitted to have proceeded on erroneous principles. The portions thus encumbered have been rewritten, so as to condense them, and thus to give clearer prominence to the existing law. In other instances the text was found already so overlaid with notes, that to have attempted to have incorporated the recent decisions and statutes in any intelligible form would have been hopeless. For this reason (assisted occasionally by other reasons of less importance), the Editor has found it necessary to rewrite certain articles. Among these are the articles on the Stamp Laws, on Alterations, on Bank Checks, on Bank Notes, Deposit Receipts, and Letters of Credit, and on the Construction of Bills.

articles have been partly rewritten ; and others (among which may be mentioned the article treating of the action on a prescribed bill) have been almost entirely remodelled.

All the new matter added to the text, and all the portions which have been rewritten, have been distinguished by being placed within inverted commas, so that the reader may have no difficulty at any moment in discriminating between the Editor's work and that of the Author. In the footnotes, it was not found necessary to follow the same system. Wherever Mr Thomson's notes contained any discussion, they have been embodied in the text, at their proper place ; and, in almost every instance, the notes are now confined to citations of authorities. Where they are not so confined, the notes added by the Editor are either distinguished by inverted commas, or so written that the context may at once show to whom the authorship is to be attributed.

The Editor has given himself much labour to endeavour to remove a cause of complaint frequently made against the former editions,—namely, that the arrangement was defective in some minor respects, and that the value which the praiseworthy accuracy of the work gave to it, was thus detracted from by the difficulty often felt by the reader in discovering the information for which he searched. To obviate this defect, the paragraphs (which formerly in some instances extended over pages) have been divided into more moderate lengths ; and opposite each paragraph a rubric has been placed on the margin, indicating the subject of which it treats. The order of the paragraphs has also been changed in some instances, so that the arrangement might be made more lucid, and might harmonize more readily with the additional matter introduced. Several of the sections (which often treated of more than one subject) have been subdivided into articles. The Editor hopes that the result of these various changes will be to improve the work as a practical book of reference.

In making the very numerous additions which the legislation and decisions of the last thirty years have rendered necessary, the Editor has followed the plan of the original work, and has made copious use of those English authorities which were applicable to the law of Scotland. Occasionally, references have also been made to the laws of the United States of America, and of other foreign countries, where it was considered that they might throw light on points in our own law which were not

firmly established, or which in any way required further elucidation. In consulting the English and foreign authorities, the Editor has chiefly used the following works, viz.—

The Law Journal Reports of cases decided in the Courts of Equity and Common Law in England. London, 1823–1865.

Chitty on Bills of Exchange, Promissory-notes, Cheques on Bankers, Bankers' Cash-notes, and Bank-notes. Tenth Edition. By John A. Russel, LL.B., and David Maclachlan, M.A., Barristers-at-law. London, 1859.

Commentaries on the Law of Bills of Exchange. By Joseph Story, LL.D. Third Edition. Boston, 1853.

Des Lettres de Change et des Effets de Commerce. Par Louis Nouguiér, Avocat. Deuxième Edition. Paris, 1851.

Die Allgemeine Deutsche Wechselordnung nebst Bemerkungen. Von S. Borchardt. Zweite Auflage. Berlin, 1860.

The Appendix has received a considerable addition. It formerly contained only a few of the statutes relating to bills of exchange; but as these statutes, though not lengthy, are very important, and as they are not printed in any other collection, the Appendix has been increased so as to embody all of them. In the Appendix there will now therefore be found a code of the statute law relating to bills of exchange as complete, it is hoped, as the circumstances will admit.

J. D. W.

1865, 1st March.

ADVERTISEMENT TO THE SECOND EDITION.

THE whole of this Work has been again carefully revised, and nearly nine hundred new cases, Scotch and English, inserted, that it might exhibit as complete a view as I could give of the actual state of the law regarding bills and notes in Scotland, and also in England, so far as the principles of English decisions are applicable in Scotland. The favour with which the attempt made in the first edition to elucidate the principles common to the law of both countries has been received, not only in Scotland, but in England and America, has formed a strong incitement to correct and improve the work. With this view, various discussions and explanations which were deemed necessary in a first attempt to trace the principles common to the law of Scotland and of England, have been suppressed, as no longer required; and I have endeavoured so to condense the whole, that, while no point is omitted which was noticed in the former edition, new cases and authorities might be added without increasing the size of the work.

The former arrangement of chapters has been retained, as I do not see any objection to the principles on which it was founded, as explained in the Preface. But the chapters have been divided more into sections than formerly, so as to render them easier for consultation.

When the new Stamp Act is passed, I intend to prepare a short summary of its provisions as to bills and notes, which shall be furnished *gratis* to the purchasers of the work, and may be bound up with it.

I am indebted to many professional friends for various suggestions tending to improve the work, and to some of them for their great kindness in revising portions of this edition.

A full Table of Contents and *Index Materialium* have been prepared by Mr C. G. Ferguson, the value of whose services in this respect is well known.

It is with sincere anxiety, and a consciousness of imperfections, even after every exertion to remedy them, that I now submit this work to my brethren and the public.

R. T.

1836, 30th May.

PREFACE.

IN a Practical Treatise on Bills of Exchange and Promissory-notes, it is unnecessary to enter minutely into their history, more especially as it is involved in great obscurity. The leading principle of bills appears to have been in some instances faintly perceived by the ancients ; but the discovery of those uses which alone raised them to the rank of an invention was reserved for modern times. At what precise period these documents, in their modern acceptation, were first introduced, is altogether uncertain. But in all those nations among whom bills, whether foreign or inland, and promissory-notes, have come into complete effect, their progress has followed, with wonderful exactness, the course of commerce. In most countries foreign commerce has taken the lead, probably from one cause among many others, that a nation, before its capital has accumulated, finds it more advantageous to purchase comforts and luxuries from nations further advanced, in exchange for its own rude produce, than to engage prematurely in manufactures. But those who, from the course of their dealings, owed money in a foreign country, would naturally wish to save the risk and expense of transmitting it in *specie*, by paying its amount to any person in their own place of residence who had money to receive in this foreign country, and obtaining from him, in exchange, a draft on his debtor for the same amount, payable to their creditor. Such a draft is a foreign bill. When, in the progress of society, a mutual commerce was established between different parts of the same country, it became important, both to secure the safe and speedy settlement of debts due from one place to another, by procuring drafts from the one place payable in the other ; and also to constitute debts due by one merchant to another in the form of a document which could be transmitted to third parties, so as to afford a fund of credit, if

necessary, to the original creditor. Hence arose inland bills, which are drawn by one party on his debtor, payable either to the drawer himself or to a third party, and are in both cases transmissible indefinitely. These documents gradually acquired almost all the privileges of foreign bills. The same privileges were last of all bestowed on promissory-notes, the simplest of commercial documents, whereby a debtor merely obliges himself to pay a certain sum to his creditor. These documents seem to have been first recognised as instruments of commerce when issued by bankers, payable to the bearer, probably because the currency of such notes was safer, if the bankers were of known credit, and was more essential for the purposes of commerce than the currency of notes granted by private individuals. But the convenience even of these notes in liquidating debts between two individuals, when there was no need for the intervention of a third party, gradually introduced them into such transactions, and gave them at last the currency as well as all the other privileges of bills. The decisions and enactments by which these several documents were brought into their present state of complete efficacy in Scotland and in England shall be afterwards noticed.

It is remarkable, that since the time when bills and notes received full effect in Scotland as commercial documents, no work with regard to them has been published by any individual belonging to the bar. Mr Forbes' Treatise, which is more than a century old, was written long before promissory-notes had acquired the privileges of bills, and before the law of prescription as to bills and notes was introduced; and although it is a work of great merit, embracing a large share of the learning applicable to bills at its date, especially of that which was to be found in the continental writers, it may be safely said, that the law of bills and notes, so far as it depends on Scotch decisions, was formed since his time. Two editions of a very respectable modern work have appeared on the same subject. But I believe it is a pretty general opinion among the profession, that a work giving a full and systematic exposition of the law of Scotland, with regard to bills and notes, as illustrated by the decisions of our Courts down to the present time, is still a *desideratum*. There is one task, likewise, of great delicacy and importance, which has not yet been performed, viz. that of combining in one treatise with the Scotch authorities, those stores of legal knowledge which are afforded by the

decisions of the English Courts, so far as the law in Scotland and England has been administered on common principles. It is with sincere diffidence that I now submit to the public a work which is intended to accomplish these two objects. I have endeavoured, after a careful examination of all the authorities and decisions, Scotch and English, down to the latest period, to unite them into one Treatise, which may explain the law of bills and notes, agreeably to the principles that are recognised in Scotland. Those who know the hazards incident to the study of a foreign system of law, will sympathize with me in the apprehension that I may in a number of instances have mistaken the application of those English authorities which are cited. But I have used every effort to avoid this risk, by excluding, so far as I could distinguish them, such cases as appeared to turn on points peculiar to English law; while I have tried to avail myself of all those which tended to illustrate the general principles of the law of bills. I have likewise used, for the same purpose, but with the same necessary caution, the works of the leading continental authors on bills, and especially Pothier's admirable work on that subject.

It remains only to state the plan of this Treatise.

Bills and notes, as between solvent parties, may be considered with reference to their constitution and legal effects as complete documents, their transmission, their execution, and their endurance, or their extinction. Their constitution and legal effects are discussed in the first two chapters. The first chapter relates to the qualities and requisites of bills and notes, including all bankers' notes, as well as drafts on bankers, considered as to their general nature and effects. The second chapter treats of them with relation to the different parties who may be bound by them, and the various modes in which these parties may be bound. The third chapter relates to their transmission, or their transference by indorsation, or otherwise. The next subject, viz. their execution, comprehends two different cases, viz. 1st, The case when a note is paid, or a bill is accepted and paid according to its tenor; and 2dly, The opposite case, when, in consequence of the proper debtor failing to accept or pay, the holder has a claim of recourse against the drawer and indorsers. The first of these cases is discussed in chapters fourth and fifth, which treat of Acceptance and of Payment. In the sixth chapter, on Negotiation,

I have discussed the measures necessary for securing the holder's recourse against the drawer or indorsers, in the event of non-acceptance or non-payment. The natural sequel to this subject is chapter seventh, on Action and Diligence, which treats of the legal remedies competent in every case against all the several parties to bills and notes, and the procedure by which these remedies are made available. In the whole of this discussion it is taken for granted that bills and notes are subsisting documents. But the fourth head, viz. their extinction, is next discussed in chapter eighth, which treats of Prescription.

This arrangement appears to exhaust the subject of bills or notes, on the supposition of the several parties concerned in them remaining solvent. But the title to such documents, their transmission, and the different claims competent on them, may be affected by the insolvency or bankruptcy of the several parties who are in right to them, or are debtors in them ; and therefore I have employed the last chapter in treating the important subject of insolvency and bankruptcy, as affecting bills and notes, considered in these different relations.

In some treatises on bills and notes, letters of credit have been discussed separately. I have conceived it advisable to insert those decisions which relate to letters of credit as guaranteeing bills or notes, especially those which respect their negotiation, in the body of this work. But I have refrained from entering into the discussion of letters of credit generally, as that forms a subject not at all connected with bills or notes.

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A

TREATISE

ON

BILLS OF EXCHANGE, PROMISSORY-NOTES, ETC.

CHAPTER I.

OF THE REQUISITES AND QUALITIES OF BILLS OF EXCHANGE, PROMISSORY-NOTES, AND OTHER NEGOTIABLE INSTRUMENTS.

A BILL OF EXCHANGE is a written request, addressed by a person who is called the drawer, to another person called the drawee, desiring him to pay a certain sum of money, either to the drawer himself, or to a third party, called the payee, within a certain time after its date, or after it is presented for payment, or on demand. If the drawee signs the bill in token of his agreeing to this request, he is called the acceptor.

Definition of bills and notes, and the parties to them.

A promissory-note is a written promise, signed by the granter, whereby he engages to pay a certain sum of money to another person, called the payee, within a specified time after its date, or on demand.

The payee of a bill or note may transfer it to a third party, by writing his name on the back, either simply, or with an order prefixed to pay its amount to a certain individual. He is then called the indorser; and the person to whom the right is transferred by the indorsation is called the indorsee or holder. This indorsee may transfer his right by the same means to a third party, and each successive indorsee may do the same.

When a promissory-note is first indorsed, it then resembles a

bill of exchange; the payee who has indorsed it being in the situation of drawer, the granter in that of acceptor, and the indorsee in the place of payee of the bill (*a*).

Bills either
inland or
foreign.

A bill is either foreign or inland. ‘Those bills, all the parties to which are resident within the same country, and which are thus regulated throughout by one system of jurisprudence, are, properly speaking, inland bills. Those bills, to which some of the parties are foreigners, and which thus raise questions of international law, are, properly speaking, foreign bills (*b*). This distinction of bills into inland and foreign, has, however, been somewhat modified by the Mercantile Amendment Acts of England (*c*) and Scotland (*d*). Under these Acts, every bill or note drawn or made in the United Kingdom, and made payable in, or drawn upon any person resident in, the United Kingdom, is to be deemed an inland bill.

‘This division of bills into inland and foreign is exhaustive. An attempt which was made, for the purpose of showing summary diligence to be incompetent on them, to set up such bills as were drawn, accepted, and payable abroad, into a third class, to be called “foreign inland bills,” was unsuccessful (*e*). Such bills are just foreign bills.’

Foreign bills are generally made payable to a different party from the drawer; but there is nothing to prevent him from being likewise payee. An inland bill is drawn either in favour of a third party, or of the drawer himself.

Of the privi-
leges of bills;

‘With a view to facilitate the constitution, transmission, and recovery of debts by means of bills and notes, the law has attached to them certain qualities, occasionally termed their privileges. Thus, although they are deeds, they have been exempted, whether *in re mercatoria* or not, from the operation of those statutes which require all other deeds to be attested with certain formalities, and they require nothing beyond the subscription of the contracting parties. In like manner, they are more easily transferred from hand to hand than other documents of debt, because an assignation of a bill or note is completed without the necessity

(*a*) *Per* Lord Mansfield, *Heyley v. Adamson*, 2 Burrow’s Rep. 669.

(*b*) Story on Bills, § 22.

(*c*) 19 & 20 Vict. c. 97, § 7.

(*d*) 19 & 20 Vict. c. 60, § 12.

(*e*) *Don v. Kealey*, 13 June 1850, 12 D. 1016; *Mackenzie v. Hall*, 12 Dec. 1854, 17 D. 164.

of intimation to any of the debtors, and in a form of the most simple character. The person to whom it may be transferred in this way (the holder) has the most ample means for recovering the debt, should legal measures be necessary. The document of debt in his hands is evidence of debt *due to him*, and cannot in Scotland (except in some unusual cases) be rebutted except by his writ or oath; and it is only in rare circumstances that he can even be called upon to show that he gave value for it. So completely is the document evidence of debt due to him, that it is well settled that even payment of the debt to one of the prior holders of the bill will not defeat his right (*a*); and still less can the debtor plead against him claims of compensation which he may have against former parties to the bill (*b*). It is the possession of these privileges which adapts bills and notes for being endowed with what may be considered as practically their most important privilege, that of affording summary execution.'

In Scotland, payment of bills may be enforced summarily, without an action. This right of summary execution was introduced by the Act 1681, c. 20, which enacts, 1st, That, on the observance of certain requisites, to be afterwards stated more particularly, there shall be summary diligence on foreign bills, at the instance of the payee or his order, and that either against the drawer or indorser in case of non-acceptance, or against the acceptor in case of non-payment, for the whole sums contained in the bill; and, 2dly, That, in case of the forms therein prescribed as essential to summary diligence not being observed, no remedy shall be competent on the bill except an ordinary action. The Act contains various other provisions, which shall be afterwards explained in detail (*c*). The right of using summary execution was afterwards extended to inland bills by the Act 1696, c. 36, which enacts, "That the same execution shall be competent, and proceed upon inland bills and precepts, as is provided (by the said Act) to pass upon foreign bills of exchange," and "which Act is hereby extended to inland bills and precepts in all points." The Act 12 Geo. III. c. 72, con-

and more particularly of summary execution on bills

(*a*) *Fairholm v. Cockburn*, 24 June 1714, M. 1506.

(*b*) *Tudhope v. Turnbull*, 18 June 1748, M. 1437 and 1510.

(*c*) This subject shall be more fully discussed afterwards, in Chap. VII. on Action and Diligence.

tains various extensions of these Acts with regard to summary diligence (*a*), and in particular, it authorizes diligence for non-payment as well as non-acceptance, against the drawers and indorsers as well as the acceptors of bills, conjunctly and severally. Inland bills have, since the date of the Act 1696, c. 36, possessed in Scotland all the privileges allowed to foreign bills.

and on notes.

Promissory-notes in Scotland were not at first allowed almost any of the privileges of bills (*b*). But the Act 12 Geo. III. c. 72, § 36 (made perpetual by 23 Geo. III. c. 18, § 55), put an end to this state of things, by enacting that “the same diligence and execution shall be competent, and shall proceed upon promissory-notes, whether holograph or not, as is provided to pass upon bills of exchange and inland bills by the law of Scotland; and that promissory-notes shall bear interest as bills, and shall pass by indorsation; and that indorsees of promissory-notes shall have the same privileges as indorsees of bills in all points.” Promissory-notes are now, therefore, altogether in the same situation with bills of exchange.

In England bills and notes are now on the same footing;

In England, even foreign bills were, till a comparatively recent period, confined to transactions between merchants, it having been sustained as a defence by the Court of King’s Bench, so late as the reign of William and Mary, against an action on a bill of exchange drawn in France, that the defendant was a gentleman, and could not, therefore, be bound by such a document, seeing bills were mercantile documents (*c*). The judgment, however, was reversed in the Exchequer Chamber on a writ of error; and it was decided that foreign bills were binding generally on all classes. Inland bills, likewise, gradually acquired in England the same privileges with foreign bills. The Act 3 and 4 Anne, c. 9, § 1, 2, makes promissory-notes indorsable in the same manner as inland bills of exchange, and confers on them the same privileges and remedies for recovery of payment which are competent by law upon inland bills. It has been decided (*d*) that this Act of Anne, being general in its applica-

(*a*) *Vide* Chap. VII.

(*b*) *Arbuthnot v. Scott*, 29 Jan. 1708, M. 12255; *Heriot v. Blyth*, Nov. 1681, M. 17020; *King v. Esdale*, 6 Dec. 1711, M. 12256; *Bundie v. Kennedy*, 12 Feb. 1708, M. 12256; *Gordon v. Forbes*, 12 Feb. 1739, M. 12258;

Gillenders v. Birwhistle, 17 July 1766, M. 12258; *Greig v. Green*, 25 Jan. 1771, M. 12259.

(*c*) *Sarsfield v. Witherly*, Carth. 82.

(*d*) *Milne v. Graham*, 1 B. and C. 192; confirmed by *Bentley v. Northhouse*, 1 Moo. and M. 66.

tion to all promissory-notes, confers on a promissory-note made in Scotland the same privileges as on a note made in England. Bills, therefore, whether foreign or inland, and promissory-notes, are now on the same footing in England as in Scotland with regard to their general requisites and privileges, and most of the rules which apply to the one are applicable to the other.

‘Till within a few years, England (almost the only country of which the laws were thus deficient) had no system of summary execution on bills. By an Act passed in 1855, a species of summary execution is now competent. The holder serves a writ of summons on the debtor, and unless the latter appears within twelve days, and either consigns the sum in Court, or makes an affidavit (satisfactory to one of the judges) disclosing a defence on the merits, the holder is to have judgment at once for the amount of the bill and expenses. Proceedings under this Act must be taken (as in Scotland) within six months of the bill becoming due (a).

and also
authorize
summary
execution.

‘In 1861, an Act was passed introducing into Ireland a system of summary procedure on bills and notes, similar in great measure to that introduced into England in 1855 (b).

There is also
summary
execution in
Ireland on bills
and notes.

‘If bills and notes have certain privileges attached to them, they have also certain disadvantages. Of these, one has been imposed on them for fiscal purposes, and another with the view of preventing the abuse of the privileges conferred on them. All inland bills and notes must at the outset be written on duly stamped paper; and their duration as documents of debt authorizing action is limited by the sexennial prescription to six years from the term at which the sum became exigible (c).’

Legal disad-
vantages
attaching to
bills.

In the present Chapter we shall consider,

I. Certain qualities and requisites connected with the general nature of bills or notes, and the purposes to which they are applicable.

II. The qualities essential to their form and constitution, and the rules according to which they are construed and receive effect.

III. Their completion by delivery,—its consequences, and the obligations arising from it.

IV. The effect of alterations made on bills or notes before or

(a) 18 & 19 Vict. c. 67.

(b) 24 & 25 Vict. c. 43.

(c) 12 Geo. III. c. 72, § 38, made
perpetual by 23 Geo. III. c. 18, § 55.

after delivery, with reference to their obligatory force, whether at common law or under the Stamp Acts.

Having thus discussed the general requisites and qualities of bills and notes, we shall examine shortly,

V. The leading peculiarities of those documents which fall under the several descriptions of bank notes, drafts or checks on bankers, and deposit receipts.

SECTION I.

QUALITIES AND REQUISITES CONNECTED WITH THE GENERAL NATURE AND PURPOSES OF BILLS AND NOTES.

1. *General Principles regulating the Form of Bills and Notes.*

There is no particular form of words necessary. But a bill must contain an order;

No particular form of words is necessary to constitute a bill or note ; it is enough if its purport be clearly expressed (a).

‘ A bill must, in the first place, contain an order ; and, although the order may be expressed in terms of courtesy, it must be clear that the order is demanded as matter of right and not as a mere matter of favour. Documents which recommend the person addressed to pay, or which request him to pay plainly as matter of favour to the payee, are not bills (b). Neither are documents bills which merely grant authority to the person addressed to make a payment (c). It is sometimes difficult, in the case of bills, to distinguish between an order expressed in terms of courtesy and a mere request. Thus, “you will please to pay” could not be held to be a mere request. It is the ordinary phraseology of a foreign bill, and is plainly enough a command in civil language. In general, however, the form of the order in bills of exchange is sufficiently marked to prevent any difficulty in regard to it.

and a note must contain a promise,

‘ A promissory-note is by no means so easily recognised (d), from

(a) *M'Kinney v. van Heck*, 15 July 1863, 1 M'Ph.

(b) *Little v. Slackford*, 1828, 1 M. and M. 171 ; *Ruff v. Webb*, 1794, 1 Esp. 129.

(c) *Hamilton v. Spottiswoode*, 1849, 18 L. J. (Ex.) 393 ; *Crowfoot v. Gurney*, 1832, 9 Bing. 372.

(d) See *Macfurlane v. Johnston*, cited p. 12, note (a).

the form of words used, as a bill of exchange. And while the doctrine that no particular form of words is necessary, is correct on the whole, it must here be received with the limitation, that the form must be such as to distinguish the document from a personal bond. The difference is simply one of form, the substance of the obligation being the same; both being engagements for the payment of money at some future time. The distinction between a note and a bond seems to be in the mode of expression. In the bond the obligation to pay is always undertaken in the present tense, and in words directly expressive of the purpose of the debtor to bind himself. In promissory-notes the engagement is in the form of a promise, conceived either in the present or in the future tense, and in words directly expressive of no more than an intention to pay on the part of the debtor. The distinction in principle seems to be no more than this, that the *de presenti* obligation to pay, which is in all cases undertaken, is in personal bonds directly expressed, and in promissory-notes left to be inferred by law.

‘The original ticket, which, as Mr Ross (*a*) remarks, “was the forerunner both of our common bond and of our inland bill,” differs from a promissory-note only in the use of the word “bind” instead of “promise,” and in containing some unnecessary additions.’

In England, it has been held that an order “*to deliver*” a certain sum (*b*), ‘or to *credit* a certain sum in cash (*c*),’ would constitute a good bill, and that a promise to a party that he or his order should receive (*d*) “a hundred pounds,” would be a good promissory-note. ‘A promise or order to *account* for a sum is not a bill or note, as the sum might be accounted for in other ways than by simple payment of it to the payee (*e*).’ It has been decided (*f*), that a mere acknowledgment of debt, without a promise to pay, is not a bill or note; and that an acknowledgment (*g*), that a party had left “in my hands L.200,” was not a bill or note, and farther, was not liable

and the order
or promise
must be for
payment.

(*a*) Lectures, vol. i. p. 45.

(*b*) Per C. J. in *Morris v. Lee*, 2 Lord Raym. Rep. 1397.

(*c*) *Eldison v. Collingridge*, 1850, 9 C. B. 574, 19 L. J., C. P. 268.

(*d*) Per Fortescue, J., 8 Modern Rep. 364.

(*e*) *Pirie v. Smith*, 28 Feb. 1833,

11 S. 473; *Horne v. Redfearn*, 1838, 4 Bing. N. C. 433, 7 L. J., C. P. 214; *White v. North*, 1849, 3 Ex. 689, 18 L. J., Ex. 317; overruling *Morris v. Lee*, 8 Mod. 362.

(*f*) *Fisher v. Leslie*, 1 Espinasse, 426; *Israel v. Israel*, 1 Camp. 499.

(*g*) *Tomkins v. Ashby*, 6 B. and Cr. 541.

to a receipt stamp. ‘A deposit receipt, whether granted by a banker or not, is not a promissory-note (a).’ An acceptance of a document addressed to the acceptor, but bearing “I promise to pay,” etc. (b); an acknowledgment to have received a sum, “which I promise to pay on demand, with interest” (c); ‘a promise to *re-pay* a sum (d); or an acknowledgment that so much is due on certain accounts, and a promise to pay it (e);’ has been held to be a promissory-note; and it has been decided that a party who signed and indorsed a document, bearing, “I promise to pay,” etc., was liable, as on a promissory-note, although another party, to whom it was addressed, had also written his name across it (f).

It has been held in England, that a note acknowledging to have borrowed a certain sum, “which I promise *never* to pay,” is a good promissory-note (g); and that documents in the form of bills, which were addressed to the drawees thus, “*At* (instead of *To*) Messrs John Morson and Co.” (h); or “*At* (instead of *To*) John Perring and Co.’s” (i), were, notwithstanding, valid bills, and afforded good ground of action against the drawers, but were not promissory-notes (k). In Scotland, where the use of summary diligence on bills and notes renders it necessary to construe them according to their obvious meaning, an express promise to pay is required, and therefore the promissory-note first mentioned would not have been sustained ‘as a ground for summary diligence,’ though the money might have been recovered from the granter by an action. The same remedy would probably have been necessary in the two other cases, seeing the documents in question had not what is essential to a bill, viz., a proper address to the drawees. This defect was not supplied by acceptance of the bills, which has been held to point out the drawee independently of any address; and the drawer’s obligation under the bill, depending on its validity as a bill, could not be effectual, if it was wanting in such an essential point.

(a) *Sibree v. Tripp*, 1846, 15 M. and W. 23.

(b) *Block v. Bell*, 1 M. and Rob. 149.

(c) *Ashby*, 3 M. and Pay. 186; *Green v. Davies*, 1825, 4 B. and C. 235.

(d) *Pirie v. Smith*, 28 Feb. 1833, 11 S. 479.

(e) *Scott v. Scott*, 1847, 9 D. 1347.

(f) *Edis v. Bury*, 6 B. and Cr. 433.

(g) *Per* Lord Hardwicke, in *Simpson v. Vaughan*, 2 Atkins, 32.

(h) *Shuttleworth v. Stephens*, 1 Camp. 407.

(i) *Allan v. Mawson*, 4 Camp. 115.

(k) *Rex v. Hunter*, Russ. and Ry. C. 511.

Action has been sustained against the drawer of a bill, which was drawn really on himself, under his own *name*, though with a different designation (*a*), he being liable as drawer, as if he had drawn the bill on a fictitious person. It has been said, that such an instrument is in legal operation rather a note than a bill. But, when the drawers and acceptors, though consisting of the same individuals, subscribe under different firms, the instrument should be considered as a bill, since the drawers and indorsers are, *ex facie* of it, distinct parties (*b*). As the partners of both firms, however, are truly the same, it has been decided, that the holder, on establishing this fact, may use diligence against any individual partner, either as drawer or acceptor (*c*). In an English case (*d*), where a bill was drawn on the defendant by a firm of which he was a partner, and was accepted by him, it was held competent to sue him under two separate declarations, in one as drawer, and in the other as acceptor.

‘In general, it may be held as settled, that if the form of a document leave it doubtful whether it is a bill or a promissory-note, the holder is at liberty to use it as either (*e*). This is a necessary principle to prevent parties from suffering unjustly, where (through ignorance) the document has been so clumsily constructed that the class to which it belongs cannot be easily determined. Thus, a draft by a man upon himself may be taken either as his bill or note (*f*). In like manner a draft by the directors of a company, on the company itself, may be treated as either a bill or note (*g*). A document beginning, “I promise to pay,” but addressed to and accepted by another, is in the same position (*h*).’

If form leave it doubtful if document be bill or note, holder may use it as either.

A bill or note must be in writing; but the writing may be in pencil (*i*).

Bills must be in writing.

(*a*) *Robinson v. Bland*, 2 Burrow’s Rep. 1077; *Roach v. Ostler*, 1 M. and Ryl. 120.

(*b*) *Per* Lord Eldon in *ex parte* Parr, 18 Ves. 69.

(*c*) *Thomson v. Liddel*, 2 July 1812, F. C.

(*d*) *Wise v. Prowse*, 9 Price, 393.

(*e*) *Edis v. Bury*, 1827, 6 B. and C. 433, and in particular, Tenterden’s opinion.

(*f*) *Roach v. Ostler*, 1827, 1 Man. and R. 124.

(*g*) *Miller v. Thomson*, 1841, 3 M. and G. 576; 11 L. J. (C. P.) 21.

(*h*) *Lloyd v. Oliver*, 1852, 18 Q. B. 471; 21 L. J. (Q. B.) 307; *Block v. Bell*, 1831, 1 M. and R. 149; *Fielder v. Marshall*, 1861, 30 L. J. (C. P.) 158.

(*i*) *Geary v. Physic*, 5 B. and C. 234. This was the case of an indorsement in pencil, but the terms of the judg-

Bills must be granted for money.

Bills or notes must be granted for money, and not for commodities. Thus it has been decided, that precepts for delivery of salt (*a*) have not the privileges of bills, but that an indorsee in such documents is merely a common assignee (*b*); and the same rule has been applied to the acceptance of a bill for delivery of grain (*c*), though in all these cases the documents founded on, being *in re mercatoria*, were sustained as probative writs; and the decision in the case of *Douglas v. Erskine* implies, that the indorsement of such a document was effectual as an *assignation*. The same thing has been decided (*d*), on the ground of mercantile usage, with regard to the indorsement of a fish debenture. In a subsequent case (*e*), where the indorsee of a fish debenture brought an action for its amount against the original holder and indorser, the Court, holding *inter alia* that debentures had not the privileges of bills, sustained a defence of compensation by him, in respect of a debt due to him by an intermediate holder, whose name did not appear on the debenture (*f*).

In England, the privileges of bills have been always refused to documents given for the performance of other acts than the payment of money. ‘ This rule is followed even when there is a promise to pay money, but something else is promised over and above. Thus a promise to pay money and to deliver certain horses was

ment were general; the opinion of Abbot, C. J., being that “there was no authority for saying that where the law requires a contract to be in writing, that writing must be in ink.” It will be kept in view, that in England indorsements do not prove themselves, and must always be supported by parole evidence. In *Williamson v. Kennedy*, 13 Feb. 1857, 19 D. 443, an improbativ agreement in pencil was sustained after proof of *rei interventus*. In deciding this case, doubts were expressed whether a probative deed in pencil would be equivalent to one in ink.

(*a*) *Lesly v. Robertson*, 16 Dec. 1713, M. 1397; *Douglas v. Erskine*, 18 Feb. 1715, M. 1397.

(*b*) *Ibid.*

(*c*) *Bruce v. Wark*, Nov. 1729, M. 1399.

(*d*) *Hamilton v. Dalrymple*, 31 Jan. 1724, M. 1403.

(*e*) *Alison v. Williamson's Representatives*, 7 Nov. 1749, Morr. 16981; *Elchies, v. Bill*, No. 46.

(*f*) A promise to pay money and grant a bill for it, if demanded, was held, in *M'Intosh v. Stewart*, 13 May 1830, to be a promissory-note. The objection to the document, that it was for more than the payment of money, not having been stated, and the decision having proceeded on the ground that to decide otherwise would open a door for evading the Stamp Acts, the case can hardly be held as infringing on the general principles stated in the text.

held not a promissory-note (*a*).’ In two cases (*b*), ‘decided at a time when Bank of England notes were not a legal tender,’ certain promissory-notes made payable in money or Bank of England notes were found null, it being held that they should have been made payable in money alone.

‘Although it was well understood in Scotland that bills for the delivery of merchandise were not bills of exchange, it was generally thought that there was nothing to prevent such documents being made negotiable, if the parties chose in special terms to make them so. In a late case, however, there are various *obiter dicta* by Lord Chancellor Cranworth denying in very express terms the power of merchants so to contract. The document in that case was in these terms: “I will deliver 1000 tons of iron when required to the party lodging this document with me.” Lord Cranworth thought this document invalid, because its effect would be, if valid, to give a floating right of action to any person who might become possessed of it—a thing which, he said, could not be tolerated by the law either of Scotland or of England (*c*). Bills of lading are negotiable by special statute (*d*).’

A bill or note must be payable absolutely and at all events. The privileges of a bill have, therefore, been refused (*e*) to a document granted for payment of ten shillings *per diem* to the holder, till he should be provided with a company in the army; to a bill (*f*) made payable only in a particular event; and to a bill where the payee was uncertain (*g*). But a document which makes the payment certain, is valid as a bill, though it provides for payment out of a particular fund, as, where the drawer of a bill orders the drawee to pay a third party or order L.111 “out of the first subsistence you receive for me,” but with the words added, “*which (sum) shall become due eight*

Bills must be payable absolutely.

(*a*) *Martin v. Chauntry*, 2 Strange, 1271; see also *Bolton v. Dugdale*, 4 B. and Ad. 619.

(*b*) *Imeson, ex parte*, 2 Rose’s B. C. 225; *Darison, ex parte*, Buck, B. C. 31. *Vide also, Rex v. Wilson*, Bayley, 11. Some observations on bills demanding payment in other bills will be found in *Bolton v. Richard*, 6 T. R. 139, and in *ex parte Dickson*, 6 T. R. 142.

(*c*) *Dickson v. Bovil*, 29 July 1856, 3 Macq. Ap. Ca. 1.

(*d*) 18 & 19 Vict. c. 111.

(*e*) *Viscount Garnock v. The Duke of Queensberry*, Feb. 1721, Morr. 1401.

(*f*) *Campbell v. Campbell*, 1793, Morr. 1410.

(*g*) In *Inglis v. Wiseman*, 27 July 1739, M. 1404, a bill payable to A., or on his death to his second son, was found null.

months after date;" these last words being held to make the debt absolute (a). Again, the Court sustained a bill made payable to a wife after her marriage, exclusive of the *jus mariti* (the debt for which it was granted not falling under the *jus mariti*), because the exclusion was intended, not to make the payment conditional, but to designate the wife as the proper payee (b).

Law of Eng-
land as to this.

In England, with regard to bills, and also promissory-notes, which are on the same footing with them, these rules are established: 1st, That no document can be considered as a bill or note, in which the sum to be paid is not precisely fixed, or in which payment is made to depend on a contingency, or in which there is any uncertainty, either as to the obligant or the payee, as where a bill or note is made payable by or to A. or B.; which case, however, is different from that to be afterwards mentioned, of a bill or note blank in the payee's name;—2dly, That, though a bill payable only out of a particular fund cannot be sued on as a bill, the acceptance of it warrants an action against the acceptor for money had and received to the holder's use (c); and operates an assignment of the fund in the acceptor's hands, to the exclusion of his general creditors (d);—and, 3dly, That a document is valid as a bill or note, *if the payment is certain*, although a particular fund should be pointed out as that out of which it is expected to be made, or though the payment is not to take place till the occurrence of an event not yet arrived (e), or though it is not to be made till notice by the payee,

(a) *M'Dowal v. Duke of Douglas*, June 1731, Morr. 1541. In *Macfarlane v. Johnston*, 3 June 1864, 2 Macph. 1210, a document by which the granter agreed to pay a certain sum during a certain period was held to be a note. This case may be consulted on what constitutes the difference between a note and an obligation.

(b) *Mungal v. Calder*, 11 Jan. 1750, Morr. 5771.

(c) *Maber v. Massias*, 2 Bla. 1072.

(d) *Kirk, ex parte*, 1 Atk. 108.

(e) For an illustration of the first of these rules, consult *Carlos v. Francourt*, 5 T. Rep. 482; *Roberts v. Peake*, 1 Burr, 323, which are leading cases;

and *Dawkes v. Lord Deloraine*, 2 Bla. 781; *Hill v. Halford*, 2 B. and P. 413; *Blackenhagen v. Blundell*, 2 B. and Ald. 417; *Kingston v. Long*, Bayley, 16; *Smith v. Boheme*, 3 Lord Raym. 67; *Beardesley v. Baldwin*, Str. 1151; *Braham v. Bubb*, Chitty, 87; *Appleby v. Biddulph*, cited 8 Mod. R. 363; *Joceylin v. La Serre*, 10 Mod. R. 294, 316; *ex parte Tootel*, 4 Ves. jun. 372; *Jenny v. Herle*, Lord Raym. 1361; *Pearson v. Garret*, 4 Mod. 242; *Haydock v. Linch*, 2 Raym. 1563; *Banbury v. Liset*, 2 Str. 1211; *Ralli v. Sarrell*, 1 Dowl. and Ryl. 33; *Palmer v. Pratt and Others*, 9 Moore, 358; *Clarke v. Perceval*, 2 B. and Ad. 660; *Morgan v. Jones*, 1 C. and J. 162. The same rule

provided there is an unconditional acknowledgment of debt (a). These rules appear in the abstract to be consistent with those of our law (b).

It has been made a subject of discussion in England, whether conditions of payment, when contained in a separate memorandum on the bill or note, may not control its effect, so as to render it inoperative. These points appear to be settled by the English Courts: 1st, That a memorandum, written on the bill or note, with the consent of parties, before they subscribe, may limit or do away its effect, at least in a question between the original parties (c). 2dly, That a memorandum has no such effect, unless it is proved to

Effect of
memoranda
marked on the
bill.

is farther illustrated by the cases of *Leeds v. Lancashire*, 2 Camp. 205; *Hartley v. Wilkinson*, 4 Camp. 127; *Williamson v. Bennet*, 2 Camp. 416; *Smith v. Nightingale*, 2 Starkie, 375; per the Lord Chancellor in *Yates v. Grose*, 1 Ves. 281; *Bolton v. Dugdale*, 4 B. and Ad. 619; *Alexander v. Thomas*, 20 L. J. (Q. B.) 207, 16 Q. B. 333; *Emly v. Collins*, 6 M. and S. 144; *Robins v. May*, 11 A. and E. 213; *Agrey v. Fearnside*, 4 M. and W. 168, 7 L. J. (Ex.) 288; *Robins v. May*, 29 Nov. 1839, 9 L. J. (Q. B.) 22. For cases as to the uncertainty of the obligant or payee, vide *Rex v. Richards*, Russ. and Ry. C. C. 193; *Rex v. Randall*, ibid. 195; *Ferris v. Bond*, 4 B. and Ald. 679; *Blackenhagen v. Blundell*, 2 B. and Ald. 417.

The cases in support of the second rule have been already noticed.

In illustration of the third rule, reference may be made to *Macleod v. Jarr*, Str. 762; *Pierson v. Dunlop*, 2 Cowp. 571; *Burchell v. Sclocock*, Lord Raym. 1545; *Hausouillier v. Hartsinsk*, 7 T. R. 733; consult also *Butler v. Cripps*, 6 Mod. 29. In all these cases a particular fund is referred to, though the payment is declared to be independent of it. Vide also *Andrews v. Franklia*, 1 Str. 23; *Cook v. Colehan*, Willes, 393; *Goss v. Nelson*, 1 Burr. 227; in which cases the payment is delayed till the occurrence of a future though

certain event. In *Evans v. Underwood*, as stated in 1 Wils. 262, the reporter says he heard that the Court gave effect to a note which was made payable on the payee receiving his wages from his Majesty's ship *Suffolk*. But the Court are said to have afterwards doubted whether this was so decided; and though they intimated that the decision, if given, must have proceeded on the ground of the paying off of the ship being a certain event, yet Bayley reasonably questions the soundness of such a decision, as it was uncertain whether the payee might ever receive his wages.

(a) *Clayton v. Gosling*, 5 B. and Cr. 360; also *Richards*, 2 B. and Ad. 447.

(b) Ivory's note to Erskine, iii. 2, 38.

(c) In *Leeds v. Lancashire*, 2 Campbell, 205, where it was maintained that the note sued on had been rendered conditional by a memorandum on the back of it, written before signature, Lord Ellenborough held, that this might possibly have been a note notwithstanding in the hands of an onerous indorsee, though the memorandum had the effect of voiding it as between the original parties. In the subsequent case of *Hartley v. Wilkinson*, 4 Camp. 127, his Lordship sustained a similar memorandum, to the effect of voiding the note even against an indorsee.

have been written before the subscription of the bill or note (*a*).
3dly, That a memorandum annexed to a promissory-note, specifying a particular place of payment, is not in any case to be held as part of the note (*b*), or as limiting its operation. Such a memorandum annexed to the address or acceptance of a bill has been held to be in a different situation, for reasons to be afterwards explained.

‘ A memorandum on a bill, making reference to a separate agreement, does not of itself make the bill conditional. Thus a promise to pay L.100, “as *per memorandum* of agreement,” is presumed to be unconditional (*c*). The production of the agreement, and the showing of it to be conditional, would probably have the effect of giving to the bill itself the same character, even as regarded indorsees. In the case of a receipt for money, “per agreement,” parole evidence was admitted to show what the agreement was (*d*). Where a memorandum on a bill is to be founded on as an agreement, it must be duly stamped with the proper agreement stamp (*e*).

‘ In one Scotch case, a distinction was taken between the effect which certain words would have had if written in the body of the bill, and the effect which they had when written as a memorandum at the foot. A draft, payable to bearer, was held not to lose its character, because it bore on the lower part of the paper, quite apart from the signature or address, the words, “per James Martin;” but, at the same time, it was found that, had these words been inserted in the body before the signature, as a continuous part of the order

(*a*) In *Stone v. Metcalf*, 4 Camp. 217, and cases in preceding note.

(*b*) *Exon v. Russell*, 4 M. and S. 505; *Price v. Mitchell*, 4 Camp. 260; *Sanderson v. Judge*, 2 H. Bl. 509; *Wild v. Rennard*, 1 Camp. 425; *Richards v. Lord Milsington*, Holt, C. N. P. 364; *Williams v. Waring*, 1829, 10 B. and C. 2. In another case—*Spitsbergen v. Kohn*, 1 Starkie, 125—being an action by an indorsee against the granter of a note made in Prussia, payable at seven days’ sight, but to which these words were added, before it was issued, “*accepted by myself, payable everywhere* ;” Lord Ellenborough held, that these words formed

no part of the original instrument, but merely acknowledged the sight of the note, and that, though contemporaneous with it, their effect in law was subsequent, viz., in regulating the term of payment.

(*c*) *Jury v. Barker*, 28 May 1858, 27 L. J. (Q. B.) 255; *Bill v. Crick*, 1836, 1 M. and W. 232; *Soutar v. Soutar*, 5 Dec. 1851, 14 D. 140.

(*d*) *Thomson v. Geekie*, 6 Mar. 1861, 23 D. 693.

(*e*) *Cholmely v. Darley*, 1845, 14 M. and W. 344; 14 L. J. (Ex.) 328; *Sweeting v. Halse*, 1829, 9 B. and C. 365.

itself, it would have been regarded as payable only to the individual named (a). This case probably proceeded on a view of the intention of the parties in the particular circumstances, and the result made it unnecessary to inquire when the memorandum was written. The case cannot, therefore, be taken as settling in any way that in Scotland a bill may not be made conditional by a memorandum subscribed to it, or endorsed on it, before signature.'

It is no objection to a bill or note that it contains statements or explanations which are extraneous to its proper nature, provided these do not limit or qualify the obligation contained in it; as, for instance, a bill drawn for payment of L.100, as the price of a crop of corn and grass, "which are instantly sold you at the foresaid price" (b); or a bill in these words: "Pay to me, or order, the sum of ; and this, with my receipt, shall be a sufficient discharge of all I can ask or claim of you preceding this date" (c); it being held that the insertion of this discharge did not affect the proper obligation in the bill. 'Words descriptive of the value which has been given for the bill, or of something collateral which has been done at the time of granting it, are admissible. For example, a bill granted "on account of wine had of the drawer," is good (d). And promissory-notes, stating that certain deeds had been lodged as collateral security, are also good (e). If, however, what is added (though it may be extraneous to the bill or note) should contain another substantive obligation, and not a mere explanation, the bill or note may be bad, as not being for the payment of money alone.'

Effect of extraneous statements contained in bills.

A bill or note is not invalid, though it should stipulate interest from its date, or from the date of payment. Such a stipulation, to take effect from the date of payment, cannot be held to annul it; for interest was declared to be due from that date upon accepted

Bill may stipulate interest;

(a) *Swan v. Bank of Scotland*, 8 Dec. 1841, 4 D. 210.

(b) *Wilson v. Smith*, 6 Dec. 1722, Morr. 1402.

(c) *Trotter v. Shiel*, 21 Feb. 1738, M. 1402. A bill of the same kind was sustained without any objection on that ground in *Erskine v. Thomson*, 12 Dec. 1711, M. 1501.

(d) *Buller v. Crisps*, 6 Mod. 29. See also *Hausouillier v. Hartsinsk*, 7 T. R. 733.

(e) *Wise v. Charlton*, 18 April 1836, 6 L. J. (K. B.) 80; *Fancourt v. Thorne*, 12 June 1846, 15 L. J. (Q. B.) 344.

bills, by the Act 1681, c. 20 ; the terms of which, on this subject, seem almost sufficient to include all bills, but which, at any rate, was extended in this, as well as in all other points, to inland bills, by the Act 1696, c. 36 (a). Promissory-notes were placed, in this as in other respects, on the same footing with bills, by the 12 Geo. III. c. 72, § 36. In England, the same rule exists at common law (b). The stipulation, therefore, of interest, either on bills or notes, from the date of payment, merely expresses what the law provides, and hence it cannot be a ground of nullity. Accordingly, the objections stated appear to have been confined chiefly to those bills or notes which stipulate interest from their dates. But such a stipulation does not form a good objection. Its existence affords a presumption, that the debt has been incurred at *the date* of the bill or note, though the payment of it may have been delayed. It was once objected to such a stipulation, that it was inconsistent with mercantile practice ; but this was found not to be the case. Finally, it was objected that this stipulation tended to convert bills or notes (contrary to their proper nature) into permanent securities for money. But this objection applied equally to stipulations of interest from the term of payment, though they formed no ground of nullity, because such interest is due *ex lege*. This, however, was the strongest objection against bills or notes stipulating interest from their dates, at a time when (from there being no short prescription of these documents) it was possible that they might be kept up for an indefinite time. But that risk was removed by the sexennial prescription (c). Accordingly, the Court gave full effect to such bills after the sexennial prescription was established. In the case of *Sword v.*

(a) *Vide Blair v. Oliphant*, 8 June 1705, M. 473, in which this was decided to be the effect of the Act 1696.

(b) *Laing v. Stone*, 2 M. and Ryl. 561.

(c) In the first edition of this work, a sketch was given of the remarkable fluctuation of judgments which took place, for many years, on this subject. That sketch has been now suppressed as unnecessary. But those who feel inclined to trace the history of the law on this subject may consult the following cases, which are in favour of bills

bearing interest from their dates ; viz., *Haliburton v. Ker and Lord March*, 16 Feb. 1725, 5 Brown's Supp. 156 ; *Henderson v. Sinclair*, Dec. 1727, Morr. 1418 ; *Brown v. Irvine*, Feb. 1733, 2 Fol. Dict. 554 ; *Dinwoodie v. Johnstone*, 28 June 1737, Morr. 1419 ; *Elchies, No. 16, v. Bill* ; *Gilhagie v. Orr*, 13 Dec. 1728, Morr. 1421-2 ; *Dun v. Adam*, 5 Feb. 1735 ; *Elchies, No. 5, v. Bill* ; *Schaw v. Russell*, 9 June 1743, Morr. 1423 ; *Elchies, No. 30, v. Bill* ; *Lauder v. Murray*, 10 June 1744, Morr. 1424, mentioned in *Elchies, No. 30, v.*

Blair (a), the Court, proceeding chiefly, as is now ascertained (b), on “the general understanding and practice of merchants, regarding stipulations of interest in bills, *e.g.*, bankers’ notes and East India bills,” held, that the former decisions, annulling “bills bearing a clause of interest, were erroneous,” and passed a bill of advocacy against a judgment of the Commissaries which had refused action on the bill. This decision, therefore, may be considered as settling the validity of bills stipulating interest from their dates. ‘Although such bills are frequently seen in practice, the objection is never taken’ (c). In England their validity has been uniformly admitted (d). ‘The clause of interest may also specify the rate’ (e).

It has been decided in several cases (f), that a bill which stipulates a penalty is null, the stipulation being inconsistent with the nature of bills. But it would perhaps be now held, that a bill or note containing such a clause is good, and that the clause is to be considered *pro non scripto*, agreeably to the principle already laid down, that a bill is not vitiated by the insertion of an extraneous clause, which does not affect the essence of the obligation. Indeed,

and perhaps
also for
penalty.

Bill; *Gordon v. Gordon*, 2 Nov. 1750, Morr. 1426; *M’Lauchlan v. M’Lauchlan*, 2 Jan. 1760, Morr. 1432; and the following cases, which are unfavourable to such bills, viz., *Innes v. Flockhart*, 1727, Morr. 1419; *Thoirs v. Fraser*, 3 Dec. 1730, Morr. 1469; *Chatto v. Davidson*, Feb. 1730, Morr. 17031; *Macneil v. Campbell*, 24 June 1741, Morr. 1422; *Paterson v. Finlays*, 25 Feb. 1741, Morr. 1422; *Elchies*, Nos. 22 and 23, v. Bill; *Drummond v. Graham*, 9 Dec. 1743, Morr. 1424; *Gordon v. Lady Kinminity*, 9 Dec. 1747, Morr. 10194; *Elchies*, v. Bill, No. 48; *Lockhart v. Merrie*, 11 Dec. 1750, Morr. 1427–8; *Elchies*, v. Bill, No. 48; *Moncreiff v. Moncreiff*, 30 July 1751, *ibid.* No. 51; *Dalrymple v. Lyon*, 24 June 1757, *ibid.* No. 53; *Douglas and Lindsay v. Brown*, 16 Dec. 1757, Morr. 1429–32.

(a) *Sword v. Blair*, 23 June 1790, M. 1433.

(b) *Vide* note of *Errata* to the Fac. Rep. M. 1435.

(c) *Sutherland v. Monro*, 13 Nov. 1847, 10 D. 87; *Scott v. Scott*, 23 June 1847, 9 D. 1347; *Pilling v. Drake*, 30 June 1857, 19 D. 938, are cases where, had the objection been stateable, the documents sued on would have been valid, notwithstanding their want of the promissory-note stamp.

(d) *Florence v. Jennings*, 1857, 26 L. J. (C. P.) 274; 2 C. B., N. S. 454; *Hudson v. Fawcett*, 1844, 13 L. J., C. P., 141; 7 M. and G. 348; *Kennerley v. Nash*, 1 Starkie, 452–3; *Cameron v. Smith*, 2 B. and A. 305; *Doman v. Dibdin*, 1 Ryan and Moodie, 382.

(e) *Keene v. Keene*, 5 Nov. 1857, 27 L. J. (C. P.) 88.

(f) *Innes v. Flockhart*, 1727, M. 1418–19, and 1469–71; *Drummond v. Graham*, 1743, M. 1424; *Thoirs v. Fraser*, 1730, M. 1469.

it has been decided, that a bill is valid, though it stipulates for "penalty conform to law" (a), it being held that such a clause is superfluous, because by law no penalty is due. But the same principle seems to be applicable, although the words "conform to law" should be omitted; since it may be fairly presumed, that a party who stipulates for penalty in a bill believes that it is "conformable to law." 'In one English case, the effect of a penal clause (authorizing the sale of a property in the event of non-payment) was discussed but not decided' (b).

2. Restrictions which the Nature of Bills and Notes imposes on their Use.

History of use
of bills.

Bills and notes are limited, in some measure, from their nature as commercial documents.

As bills and notes were at first devised for the adjustment of real debts in the ordinary course of business, courts of law have repeatedly interposed to prevent them from being misapplied to different purposes. Foreign bills, which were first introduced, have been all along employed chiefly for the quick adjustment of mercantile transactions between different countries. But after merchants had recourse to inland bills, which were often made payable, not to a third party, but to the drawer himself, and still more, when promissory-notes were introduced, these obligations, being primarily constituted betwixt two parties only, viz., the obligant and the obligee, were naturally extended to all obligations for payment of money, whether connected with commerce or not. These documents, however, acquired at last the privileges of foreign bills, and, in particular, were made indorsable like them, so that they also became, in a great measure, commercial documents. Hence it was considered dangerous to allow even them to be granted for transactions out of the ordinary course of business, seeing they enjoyed that exemption from strict form, and that facility of transmission, which were allowed chiefly, if not solely, from indulgence to commerce. This was more strongly felt in the case of inland bills, so long as there was no fixed limit to their endurance except the long

(a) *M'Neill v. Campbell*, 24 Jan. 1741, M. 1422; *M'Lauchlan v. M'Lauchlan*, 2 Jan. 1760, M. 1432. (b) *Storm v. Stirling*, 1854, 23 L. J. (Q. B.) 298; *Cowie v. Stirling* (s. c.), 1856, 25 L. J. (Q. B.) 335.

prescription ; and, during that period, the Court made many attempts, on the one hand, to restrict their operation to proper mercantile transactions, and, on the other, to fix some period at which their peculiar privileges, and even their efficacy as documents of debt, should cease. But this danger became less imminent after the sexennial prescription was introduced ; and, therefore, there has not been, since that time, the same inclination that there was before, to abridge either the extent or duration of the extraordinary privileges of bills and notes. The combined result of all these circumstances has been, that, on the one hand, the simple form of bills payable to the drawer, and of promissory-notes, has rendered them applicable to many obligations, which the form and primary object of foreign bills of exchange would have excluded (this enlargement of their operation being now also rendered safer by the sexennial prescription) ; and, on the other hand, that such notes or inland bills, having acquired all the privileges of other bills, are restricted on that account more closely than they would otherwise have been, to the proper purposes of mercantile documents.

Still it is not easy to fix a precise limit for their operation. But the primary purpose of bills or notes being the adjustment of debts in the ordinary course of business, there are certain objects inconsistent with this, to which the Court has, therefore, found that they are inapplicable. Thus, it has been decided, that a bill is not effectual to constitute a legacy, or donation *mortis causa* (a). ‘The cases in which this principle is laid down are old ; but there is one of them which occurs some time after the introduction of the sexennial prescription, and their authority has been recently recognised (b). In England it is questionable if the doctrine would receive effect. The authority of the old cases which seem to recognise it, is questioned by the editors of the last edition of Chitty on Bills (c) ; and there is one case in which it seems to have been

Bills may not be used to constitute legacies, or donations *mortis causa* ;

(a) *Fulton and Clark v. Blair*, 9 Nov. 1722, M. 1411; *Huttons v. Hutton*, 13 Feb. 1724, M. 1412-3; *Myrton v. Livingston*, cited in the case of *Huttons*; *Wright v. Wrights*, 11 Feb. 1761, M. 8088; *Dowie v. Millie*, 2 Feb. 1786, M. 8107. These were all cases of bills, and the question occurred in all of them

with the original payee. As will afterwards be mentioned, such bills are good in the hands of an onerous indorsee.

(b) *Per* Lord Justice-Clerk (John Hope), in *Cruickshanks*, 10 Dec. 1853, 16 D. 169.

(c) Chitty on Bills, 12th ed. p. 7.

assumed by the Court of Exchequer, that the payee of a delivered bill could recover, if he proved that it was given him as a legacy ; and that the payee even of an undelivered bill could recover, if the bill were attested in terms of the Wills Act' (a).

' If the authority of one Scotch case can be relied on, there is a very simple method in Scotland of avoiding the operation of this principle, viz., by the intervention of a trustee, to whom the donor grants a bill, and by whom, in turn, a bill is granted to the donee.' Where a person had, with the avowed purpose of granting donations *mortis causa* to his widow and children, accepted bills drawn by the wife's brothers, who, in return, granted equivalent bills to the donees, the Court sustained action by the drawers of the original bills against the acceptor's representative (b), holding that they at least had given value for these bills, by the equivalent bills which they accepted in favour of the wife and children. The Court appear likewise to have held generally in this case, that such documents ought now to be more liberally construed, since the sexennial prescription, by shortening their duration, had lessened the facility of committing fraud by means of them.

or donations
inter vivos ;

It has been also decided, that a bill granted by way of a donation *inter vivos* cannot be effectual to the grantee (c).

but may be
indorsed and
delivered for
these purposes.

It has been farther decided, that although a bill cannot be *granted* with the view of constituting a donation, it may be *indorsed* with that view, ' to the effect of giving the donee a right to recover from the parties to the bill previous to the donor. Against the donor, the donee is prohibited from having recourse on the same principle as that which would prevent him suing on an original bill (d). That he could recover from previous parties' was the decision (e) in a case where, a husband's executors having sued his wife for two bills blank indorsed, and she having proved in defence, that her husband gave them to her after he was ill, but before he was bedrid, desiring her

(a) *Gough v. Findon*, 1851, 21 L. J. (Ex.) 58; 7 Exch. 48.

(b) *Adam v. Johnston*, 2 Dec. 1782, M. 1416.

(c) *Weir v. Parkhill*, 26 Nov. 1736, and 7 Jan. 1737, M. 1413; *Elchies, v. Bill*, No. 10; and *Gibson*, 3 Aug. 1776, 5 Brown's Supp. 392. Vide also the English cases of *Easton v.*

Pratchett, 1835, 1 C. M. and R. 798; 4 L. J. (Ex.) 335; *Nash v. Brown*, Chitty, 53, note 3; *Holliday v. Atkinson*, 5 B. and C. 501, and other cases referred to by Chitty, 53.

(d) *Easton v. Pratchett*, *ut supra*.

(e) *Barbour v. Blackwood*, 8 Feb. 1753, M. 6097.

to keep them for her own use, the Court found that the bills were properly conveyed, and assoilzied her. In another case (*a*), where a person had indorsed a bill for 1000 merks to his grandson, then under age, and put it, thus indorsed, but without particular instructions, into the hands of his son and general disponee, the Court, in an action for delivery brought by the grandson, held that his right to the bill was complete, and therefore decerned in his favour. 'In a later case, where the holder of two promissory-notes indorsed them on death-bed, and delivered them to a person, telling him to deliver one to a servant as a reward for services, and the other to certain parties as a mark of gratitude for past favours, the Court sustained the right of the donees to sue the makers (*b*). Two English decisions have carried this doctrine much further, and possibly to an unsafe extent; as it has been held that bills delivered on death-bed, but without indorsation, made valid gifts, and authorized the donees, in the first place, to force the donor's executors to indorse the bills, and, in the next place, to recover from the acceptors. The reasoning in the cases, where indorsation was treated as "a mere technicality," is unsatisfactory' (*c*).

Though a bill or note should be granted as a donation *mortis causa*, that will not affect its validity when in the hands of an onerous indorsee. The acceptor of a bill or granter of a note gives them currency as commercial documents, for which he or his representatives must be liable, without being allowed to plead any latent objection against an onerous indorsee, who has taken the bill or note on the faith of his subscription. It is on this principle that the onerous indorsee of an accommodation-bill has a direct claim against the acceptor, though the latter should be truly creditor in a question with the drawer of the bill. The point now mentioned appears to have been settled in favour of the indorsee to a bill granted originally *mortis causa*, in a case (*d*) where, although a proof was at first allowed before answer, of the facts inferring *donatio mortis causa*,

Onerous indorsees recover on bills, though granted as donations *mortis causa*,

(*a*) *Carrick v. Key*, 6 Feb. 1787, M. 17009.

(*b*) *Murray v. Todd*, 6 Mar. 1818, H. 275.

(*c*) *Veal v. Veal*, 1859, 29 L. J. (Ch.) 321; and *Rankin v. Weguiliu*, 1832,

reported in a note to the preceding case.

(*d*) *Farquhar v. Shaw*, 16 Dec. 1757, M. 12341; and *Shaw v. Farquhar*, 24 Nov. 1761, M. 1444. Although the cases are separately reported, they appear to be the same.

as well as of an allegation that the bill had not been signed by the drawer till after the acceptor's death, yet, in a reduction of the bill afterwards brought, the Court held "the objections proponed not competent against an onerous indorsee."

or *inter vivos*. In like manner, the objection that a bill or note has been granted as a donation *inter vivos* cannot be pleaded against a *bona fide* holder for value (a).

Whether the objection that a bill was granted by way of donation, is proveable by parole?

It is a question, How far the objection of a bill or note being granted by way of donation *mortis causa* or *inter vivos*, can be proved by parole evidence? It will appear afterwards, that every bill or note presumes value received from the payee or holder, and that, in general, such a presumption cannot be redargued unless by his writ or oath. In the cases of donation already noticed, the objection arose *ex facie* of the bill or note, or was admitted by the parties. In one case, indeed (b), a parole proof 'before answer' was allowed; but it related to facts tending to establish that the original claimant on the bill had not obtained legal delivery, which, as will afterwards appear, is generally essential to give a perfect right. But a bill or note granted in order to constitute a legacy, or even a donation *inter vivos*, would probably not be held entitled to the privileges of a bill or note, and, in particular, to the presumption of value, in respect it is not truly such a document, so that the presumption of value could not be pleaded on it, against the admission of the parole evidence, more than if such evidence were offered to nullify a bill on the ground of smuggling or usury.

Bills used to effect arbitrations.

'Bills may be used as a means of referring to arbitration a dispute as to a money debt, it having been decided that' it affords no objection to the granter of a bill against payment, that it was deposited by him with an arbiter, as a security for performance of the decree-arbitral, and was given up by the arbiter to the successful party. This was decided (c) in a case, where it appeared that two parties in a submission had each lodged with the arbiters his acceptance for L.20; and that the arbiters having found one of them liable for L.13, had given up his bill to the other party, after causing that party mark on it a partial payment of L.7. The Court sustained action on it for the balance. The argument of the

(a) *Nash v. Brown*, Chitty, 53, n. 3.

(b) *Shaw v. Farquhar*, *antea*, p. 21.

(c) *Clark v. Ker*, M. 1405; Elchies.

n. Bill, No. 59.

successful party was that a verbal submission could have been effectuated by placing money at the disposal of the arbiters, and that bills are to be considered as money. A person who is thus entrusted with a bill has an absolute control over it, and therefore the right of any third party who receives it from him is complete. In the present case, the arbiters disposed of the bill agreeably to the understanding on which they received it. But, though they had done otherwise, a third party receiving the bill, without being privy to that understanding, could not have been affected by it, or by anything which did not appear on the face of the bill (a).

SECTION II.

REQUISITES IN THE FORM AND CONSTITUTION OF BILLS AND NOTES, AND THEIR CONSTRUCTION AND EFFECT.

1. *Stamp.*

‘The General Stamp Act (b) imposes a penalty of L.50 upon every person making, accepting, or paying any bill of exchange, draft or order, or promissory-note, without the same being stamped for denoting the legal duties. This penalty, though still exigible, is never enforced. The writing of bills and notes upon duly stamped paper is rendered necessary, under a more severe penalty, by an older statute (c), which has been expressly decided to be in force (d), and has been very frequently applied in practice. The language of this statute (§ 19) is very explicit and very stringent. It enacts that no unstamped bill or note “shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity.” The effect of this has been held to be very much the same as if the statute had declared that unstamped bills or notes were to be viewed as so much waste paper. No creditor can recover upon them in a court of law, or is bound, in

Necessity of stamp.

(a) See Bell on Arbitration, §§ 74, 75.

(b) 55 Geo. III. c. 184, § 11.

(c) 31 Geo. III. c. 25, § 19.

(d) *Field v. Wood*, 1837, 7 Ad. and E. 114; 6 L. J., Q. B. 209.

the event of his receiving one in the course of business, to take any of the usual steps for negotiating it; and is not liable for failure to take such steps, even though it should be proved that, had such steps been taken, the bill or note would have been paid (*a*). Nor will it entitle the creditor to any right of retention against the debtor (*b*).

Use of unstamped bill for collateral purpose.

‘It has sometimes been said that such a bill or note may be used in evidence for what has been called a “collateral purpose.” Thus it has been held, that a jury might look at an unstamped bill in order to judge, from the appearance of the handwriting, whether the writer had been intoxicated on the night on which it was written (*c*). And memoranda upon an unstamped bill, which do not form part of it, and are intelligible without referring to it, are admissible in evidence (*d*). But a jury cannot be allowed to draw any conclusion in fact from the *contents* of an unstamped bill or note, or from any writing indorsed which forms part of it (*e*). It cannot even be used as a connecting link in a proof otherwise independent of it (*f*); nor can it be produced to show that it has, or ever had, any legal validity in any capacity (*g*), either as a bill or note, or as any other kind of instrument (*h*). It cannot even be produced to show that a transaction apparently fraudulent was in reality onerous; but, on the other hand, it has been held, looking rather to the intention of the statute and to the desirableness of obviating immediate hardship than to the true reading of the clause, that an unstamped bill could be produced in order to establish that a party had committed a fraud (*i*) or done something illegal (*k*), or to show that it was unavailing for its purpose (*l*).

‘It is the duty of the Court to take the objection that a bill or note

(*a*) *Wilson v. Vysar*, 1812, 4 Taunt. 287; *Cundy v. Marriot*, 1831, 1 B. and Ad. 696. and Ad. 663; *Castleman v. Ray*, 1801, 2 B. and P. 383.

(*b*) *Ogilvie v. Taylor*, 1849, 12 D. 266. (*g*) *Williams v. Gerry*, 1842, 10 M. and W. 296.

(*c*) *Gregory v. Fraser*, 1813, 3 Camp. 454. (*h*) *Jones v. Ryder*, 1838, 4 M. and W. 32.

(*d*) *Manley v. Peel*, 1804, 5 Esp. 121; *Fraser v. Bruce*, 25 Nov. 1857, 20 D. 115. (*i*) *Keeble v. Payne*, 1838, 8 Ad. and E. 555.

(*e*) *Sweeting v. Halse*, 1829, 9 Bar. and Cres. 365. (*k*) *Coppock v. Bower*, 1838, 4 M. and W. 360.

(*f*) *Jardine v. Payne*, 1831, 1 B.

(*l*) *Smart v. Nokes*, 1844, 6 M. and Gr. 911.

is unstamped, and they are bound to give effect to it (a), although it should be waived by the parties, or the signature of the instrument admitted (b). It is immaterial at what stage of the litigation the defect in the stamp is noticed—effect must be given to it as soon as it is discovered, even though it should not be observed till the case is under appeal (c). But, after a litigation is concluded, the revival of the question in a second litigation is excluded by the plea of competent and omitted (d).

Pars Judicis to object to unstamped bill.

‘In criminal proceedings, unstamped bills or notes are admissible in evidence (e).

Use in criminal proceedings.

‘With regard to the kind of stamp required, it is a general rule that any stamp of the proper amount suffices for any instrument, provided it be not specially appropriated, by words upon the face of it, to some other class (f); but where, as in the case of bills and notes, special stamps are provided, it is wise always to use these. Promissory-notes and inland bills must be written upon stamped paper (g). Foreign bills written in this country must likewise be written upon stamped paper; but they may be drawn in sets of three or more, and in that case a smaller stamp suffices upon each bill. A penalty of L.100 is imposed upon every one drawing or negotiating bills purporting to be drawn in sets without drawing or negotiating the whole of the set; and parties in the United Kingdom taking such bills drawn here without getting the whole number of bills, are not allowed to recover upon the bill, or make it available for any purpose whatever. Before a foreign bill drawn abroad can be negotiated in this country, the holder must (under a penalty of L.50 for failure) affix to it an adhesive stamp of the same amount as would have been required for an inland bill for the same sum; and, before delivery, must cancel the stamp by writing across it his name, or that of his firm, together with the date. A person

Description of stamp required.
On bills or notes.

(a) *Home v. Purves*, 7 June 1836, 14 S. 898; *Steadman v. Duhamel*, 1845, 14 L. J. (C. P.) 271.

(b) *Milne v. Donaldson*, 1852, 14 D. 849; *Greenock Bank v. Darroch*, 1834, 13 S. 190.

(c) *Ettles v Robertson*, 1834, 7 W. and S. 176.

(d) *Napier v. Carson*, 1828, 6 S. 500; *Barbour v. Grierson*, 1828, *ibid.* 860.

(e) 17 & 18 Vict. c. 83, § 27.

(f) 55 Geo. III. c. 184, § 10.

(g) 31 Geo. III. c. 25, § 19.

taking a foreign bill is not entitled to recover upon it or make it available, unless the proper adhesive stamp be affixed and cancelled. If not cancelled, a subsequent holder may do so; but the person who ought to have cancelled, is not relieved of the penalty. The party paying the bill must write "paid" on the stamp. As far as regards the Stamp Acts, the question whether a *bill* is inland or foreign is decided by the place at which it purports to have been drawn (*a*).

On bank notes.

'The duty upon bank notes may be paid by the banks which are empowered to issue them, either by using for the notes stamped paper, or by an annual composition to Government, in which case they may issue their notes upon unstamped paper (*b*). The scale of duties upon bank notes not exceeding L.100 in amount, is, in consequence of these notes being reissuable, somewhat higher than the scale for ordinary promissory-notes (*c*). These notes, issued by the privileged banks, are the only bills or notes which can be re-issued after payment (*d*).

On bank checks.

'Checks are liable to a uniform duty of one penny, which may be paid either by writing the instrument upon stamped paper, or by affixing to it an adhesive stamp, which must be cancelled before issue by the maker writing upon it his initials and the date (*e*). Checks drawn upon bankers residing within fifteen miles of the maker, were formerly, but are not now exempt (*f*).

Amount of stamp.

'The stamps upon bills or notes are *ad valorem*; and the amount of the principal sum for which a bill or note is granted, fixes the amount upon which the stamp duty is to be calculated. Interest, therefore, is not taken into account (*g*); and that, even though it be stipulated in the instrument as payable from a date prior to that of the issue (*h*). For the same reasons which govern these decisions, in a note payable under penalties, the penalties would not require to be taken into consideration in fixing the stamp duty. It is no objection to a bill or note stamp, that it is larger than is required (*i*); but if it be smaller, the bill or note is treated as if it had no stamp (*k*).

(*a*) 17 & 18 Vict. c. 83; 23 Vict. c. 15; 24 & 25 Vict. c. 91.

(*b*) 16 & 17 Vict. c. 63.

(*c*) 55 Geo. III. c. 184.

(*d*) See *postea*, p. 178, for exceptional cases in which bills paid *before maturity* may be reissued.

(*e*) 16 & 17 Vict. c. 59.

(*f*) 21 Vict. c. 20.

(*g*) *Preussing v. Ing*, 1821, 4 B. and Ald. 204.

(*h*) *Wills v. Noot*, 1834, 4 Tyr. 726.

(*i*) 55 Geo. III. c. 184.

(*k*) *Gall v. Middleton*, 1828, 6 S. 943.

‘The Commissioners of Inland Revenue are prohibited from post-stamping bills or notes (a), except in the case of their being written upon a stamp of equal amount, but of a different denomination from that required (b). Should the Commissioners err, and post-stamp a bill or note when they were not legally entitled to do so, it has been held that the objection to the stamp was not good against one who received the bill in good faith, not knowing it to have been issued unstamped (c).’

‘In order to prevent evasions of the stamp duty, various documents which, strictly speaking, are neither bills nor notes, but bear only a certain resemblance to them, have been rendered liable to the bill and note stamp (d). Thus drafts or orders requiring payment of a sum to be made in bills, though not themselves bills, because not payable in money, are liable to the bill stamp (e). Receipts given by one person for money, entitling or intended to entitle the holder to payment from a third party; certain drafts or orders, which are not bills because they are payable from a particular fund, or upon a contingency, are all liable to stamp duty as bills (f). Under the head of notes in the Stamp Acts are included notes payable out of a specific fund, or upon a contingency, provided they are payable to bearer or order, and the whole sum payable is fixed, and does not exceed L.20. Deposit receipts by bankers which contain a clause importing that interest is to be paid, are likewise liable to stamp duty as notes. But none of the documents in this class are liable unless they are for payment of a specified sum of money (g), or unless they demand payment as matter of right (h).’

Documents *not*
bills or notes
liable to bill or
note stamp.

(a) 31 Geo. III. c. 25, § 19.

(b) 37 Geo. III. c. 136, § 5. *Chamberlain v. Porter*, 1804, 1 N. R. 30; *Kaiser v. Grout*, 1859, 29 L. J. (Ex.) 20. (In this last case a bill written on a threepenny receipt stamp, and re-stamped by the Commissioners, was held good.)

(c) *Wright v. Riley*, 1793, Peake, 173.

(d) 55 Geo. III. c. 184, schedules.

(e) *Firbank v. Bell*, 1817, 1 B. and Ald. 36.

(f) “Please to pay A. B. out of produce of certain sales,” held liable:

Emly v. Collins, 1817, 6 M. and S. 144; *Braybrooke v. Meredith*, 1843, 13 Sim. 271. Order added to an account—“Pay the above to A. B.,” held liable: *Taylor v. Scott*, 1847, 9 D. 1504; *Sutherland v. Munro*, 1847, 10 D. 87. Order to pay from proceeds a sum not to exceed so much, may be liable: *Hutchinson v. Heyworth*, 1838, 9 A. and E. 375.

(g) *Jones v. Simson*, 1828, 3 D. and R. 515. See note (b) next page.

(h) *Little v. Slackford*, 1 M. and Malk. 171; *Crowfoot v. Gurney*, 1832, 9 Bing. 372.

Exemptions.

‘ Various documents which would otherwise have been liable, have been specially excepted by the statutes from stamp duty ; such, for instance, as the bills and notes of the Bank of England, and bills for the pay and remittances of the army and navy (*a*). Other documents which somewhat resemble those included under the bill-stamp duties, have been held not to be included ; for example, orders where the sum payable is not specified (*b*) ; orders where the demand is alternative, as, for payment of a sum or delivery of a bill (*c*), I.O.U’s (*d*), deposit receipts (*e*), letters giving directions for the disposal of the proceeds of bills (*f*), and documents where the legal effect has been held to be to make, not a promissory-note or bill, but a bond (*g*) or a special agreement (*h*). This, of course, does not obviate the necessity of having deposit receipts, bonds, and special agreements stamped with the stamp proper for those denominations of deeds.

**Adjudication
stamp on docu-
ments exempt
from bill or
note stamp.**

‘ By the Stamp Act of 1850 (*i*), the Commissioners of Inland Revenue are authorized to impress an “ adjudication stamp ” upon any document liable to stamp duty, except upon documents the post-stamping of which is expressly prohibited ; and a subsequent statute (*k*) authorizes the adjudication stamp to be impressed upon documents which do not require to be stamped. If the Commissioners refuse to impress the stamp upon the application of the party presenting the document (and payment of the proper fees), an appeal is allowed against their decision to the Court of Exchequer at Westminster. When the adjudication stamp has been impressed by the Commissioners, either at once, or upon the order of the Exchequer Court, the statutes declare that the document upon which it is impressed,

(*a*) 55 Geo. III. c. 184, sch.

(*b*) *Jones v. Simpson*, 1828, 2 B. and C. 318. It has been held sufficient specification to say, “ Pay L.165 or the balance which may be found due on the work.” *Taylor v. Hutchison*, 1845, 7 D. 420.

(*c*) *Martin v. Brash*, 1833, 11 S. 782.

(*d*) *Fisher v. Leslie*, 1 Esp. 426 ; *Israel v. Israel*, 1 Camp. 499.

(*e*) *Tomkins v. Ashby*, 1827, 6 B. and C. 541 ; *Sibree v. Tripp*, 1846, 15 M. and W. 23.

(*f*) *Brierly v. Mackintosh*, 1843, 5 D. 1100, and 1846, 5 Bell, 1.

(*g*) *Miller v. Jones*, 1834, 13 S. 117 ; *Moffat v. Edwards*, 1841, 1 C. and Mar. 16.

(*h*) *Pirie v. Smith*, 1833, 11 S. 479 ; *Horne v. Redfearn*, 1838, 4 Bing. N. C. 433 ; *White v. North*, 1849, 3 Ex. 689.

(*i*) 13 & 14 Vict. c. 97, §§ 14 and 15.

(*k*) 16 & 17 Vict. c. 59, § 13.

shall be receivable in evidence in all courts of law or equity, notwithstanding any objection made to the same as being insufficiently stamped (a), or as being chargeable with stamp duty and not stamped to denote the same (b). These Acts were intended to make documents upon which the adjudication stamp should be impressed unchallengeable under the Stamp Acts; but it is not quite clear, at all events as far as concerns documents stamped with the adjudication stamp under the powers conferred by the first Act, whether courts would not still be bound to discuss the question, whether the document were liable to the bill or note stamp.'

2. *Requisites in Form and Constitution.*

(1.) The next requisite in bills or notes is the subscription of parties. Subscription.

By the law of Scotland, no person can be bound, either as drawer, acceptor, or indorser of a bill, or as maker or indorser of a note, unless he has subscribed it.

An early statute (c) requires the granter's subscription to all obligations of importance, which is understood to mean obligations for any sum exceeding L.100 Scots. That Act prescribes, besides, certain other solemnities, still farther extended by a later statute (d); but with all of these custom has dispensed in the case of bills and promissory-notes. Though the solemnities required in other cases to authenticate the subscription are thus dispensed with, custom has not dispensed with the subscription itself, which therefore still continues, in general, to be indispensable.

In one case, indeed, viz., where the bill or note relates to a sum below L.100 Scots, there 'was, at one time,' reason to think that subscription would not be absolutely necessary (e); 'but as it has been provided by statute (f) that all bills or notes below L.5 must be subscribed, and that in presence of an attesting witness, it would be absurd now to hold that bills of a value intermediate between

(a) 13 & 14 Vict. c. 97, §§ 14 and 15. Kennedy v. Watson, 25 May 1816, F. C.

(b) 16 & 17 Vict. c. 59, § 13.

(c) 1579, c. 80.

(d) 1681, c. 5.

(e) *Vide* Lord Glenlee's opinion in

(f) 8 & 9 Vict. c. 38, § 17. (The operation of this enactment has been suspended for three years, 26 & 27 Vict. c. 105.)

that sum and L.8, 6s. 8d., were valid without signature at all. Such a decision would, moreover, be quite contrary to practice.'

There is a case, in which an equivalent is admitted for the subscription of the granter of a note. In England he is bound without subscribing (*a*), provided the instrument be written and his name inserted in the body of the note, by himself, or some person authorized by him. A similar doctrine has been recognised in Scotland (*b*).

'By the Mercantile Amendment Acts of 1856 it is enacted (confirming the common law of Scotland, and altering that of England), "that no acceptance of any bill of exchange, whether inland or foreign, made after 31st Dec. 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor, or some person duly authorized by him"' (*c*).

The subscription must be in writing; but it has been held to be effectual though written in pencil (*d*).

Various substitutes have been received in place of the full subscription of a party, when he is unable to adhibit it.

Notarial
subscription.

1st, When a party could not write, the Court sustained (*e*) a bill subscribed for her by one notary before two witnesses, though these witnesses were not described in the bill itself, but only in the notary's doquet. 'It was stated, however, in the case next quoted, that the chief reason for this decision was, that the debtor did not dispute having authorized the notary to sign on his behalf.' In a later case (*f*), the Court decided that a bill was void, though subscribed

(*a*) *Taylor v. Dobbins*, Str. 399; *Saunderson v. Jackson*, 2 B. and P. 238.

(*b*) *A. v. B.*, July 1750, M. 1442; *Elchies, v. Bill*, No. 47; *Gillespie v. Donaldson's Trs.*, 22 Dec. 1831, 10 S. 174. In the second edition of this work, it was stated that this rule applied also to the drawer of a bill, who, it was said, was bound, if he wrote the bill and inserted his name in the body of it. This statement has been deleted, as the authorities which were relied on did not support it. In *Elliot v. Cooper*,

Str. 609, the point was not touched; *Erskine v. Murray*, Ld. Raym. 1542, was an action against the acceptor; and in *A. v. B.* (just quoted) it did not clearly appear against whom the diligence was sought.

(*c*) 19 & 20 Vict. c. 60, § 11, and 19 & 20 Vict. c. 97, § 6.

(*d*) *Geary v. Physic*, 5 B. and Cr. 234; *ante*, p. 9.

(*e*) *Dinwoodie v. Johnston*, 28 June 1737, M. 1419.

(*f*) *Buchanan v. Duncan*, 27 June 1765, M. 1451 and 16985.

by two notaries, when there were no witnesses attesting their subscriptions. 'In another case, they found a bill, signed by one notary without witnesses, to be null' (a). But it does not appear to be required, in any case, that a bill should be subscribed by two notaries and four witnesses, in terms of the Act 1579, c. 80, which seems applicable only to more formal deeds. The case first noticed appears to establish that one notary and two witnesses are sufficient. From what is said, however, to have been the ground of deciding the case, it remains still uncertain, in the event of a party not admitting his subscription, 1st, Whether it is necessary to describe the witnesses, or whether it is not enough that they were present? and, 2dly, Supposing it necessary to describe them, whether a description of them in the notary's doquet is sufficient? Their signature appears to be indispensable.

Summary diligence would probably be competent on a bill or note signed by two notaries for a party who could not write, if their signature was attested by four subscribing witnesses fully designed, because such a subscription is *prima facie* authentic. 'Any less formal notarial subscription would not authorize summary diligence.'

2dly, Our law has gone farther, by holding the initials of a party's name to be in some cases equivalent to subscription. Even in deeds wherein the statutory solemnities are required, it appears to be now settled (b), that the initials of a party are equivalent to his full subscription (this mode of subscribing being always attested, like any other, by the proper statutory solemnities), when he is either in use to subscribe by initials, or cannot subscribe in any other way. In bills and notes, the statutory solemnities are not required to attest a subscription by initials, more than any other kind of subscription. But some kind of evidence has been always required, both to prove that the party did sign, and that this was his usual mode of signature. In an action (c) against a husband on a note granted by his wife before marriage, her subscription by initials was sustained, when supported by one subscribing witness, a woman,

Subscription
by initials.

(a) *Fyfe v. Bean*, 23 June 1762, 5 Br. Sup. 887.

(b) *Weirs v. Ralston*, 22 June 1813, F. C.

(c) *Wilson v. Robertson*, 2 Feb. 1688, M. 12493.

and by her own oath. Again, the subscription to a bill by initials of a person deceased was sustained (*a*), it being proved that this was his usual mode of subscribing, and that the signature resembled his ordinary subscription, and the writer of the bill having deponed besides that he saw him sign. On the other hand, an ignorant country woman, who had never been in use to write, and could not even read, having filled up the initials of her name to a bill in blank scores traced by another person for that purpose, the Court (*b*) decided that the bill was null. In the next case (*c*), a party's acknowledgment that she had subscribed her initials to three bills for 100 merks each, was justly held sufficient without other proof. In an action (*d*) on a promissory-note, said to have been indorsed to the pursuer by the initials of a person deceased, the Lord Ordinary, in respect the pursuer admitted "that he could not prove that the deceased did actually adhibit her subscription by initials," held that the indorsement was null; and the Court, without difficulty, affirmed the judgment. The result of all these decisions appears to be, that, besides the initials of the party, there must be sufficient evidence, both that these initials were written by him, and also that this was his usual mode of signature, except perhaps when the subscription is proved by his acknowledgment.

There can be no summary diligence on bills or notes so subscribed (*e*), because the reality of the subscription is not ascertained *ex facie* of the document. This reason appears to be sufficient, without supposing, as has been done (*f*), that such documents are not to be considered as bills or notes at all, but merely as documents of debt. Indeed, it is only because they are considered as bills or notes that they are, from favour to commerce, admitted even as

(*a*) *Thomson v. Shiel*, July 1729, M. 16810. In an old case, *Stewart v. Stewart*, 25 June 1679, 2 Br. Sup. 475, the subscription of a bond for 2000 merks, by initials, was sustained, it being proved that the party was in use so to subscribe; and reference is there made to an earlier case, where a bond for L.500 (Scots) had been sustained, though it was subscribed by a mark "like a craw-tae."

(*b*) *Pringle v. Keill*, Feb. 1735, M. 16810.

(*c*) *Shepherd v. Innes*, 19 Nov. 1760, M. 589.

(*d*) *M'Ilwraith v. M'Micken*, 23 June 1785, M. 16820.

(*e*) In *Monro v. Monro*, 14 Nov. 1820, Hume, p. 81, the point was held as settled. *Vide*, in support of the reason given in the text, the case of *A. v. B.*, 1750, M. 1442.

(*f*) 1 Bell, 390.

documents of debt, without the statutory solemnities required in more regular deeds. They are also entitled to all the other privileges, and subject to the same rules of negotiation with bills or notes, though they cannot, for the reason now mentioned, afford warrant for summary diligence.

3dly, Subscription by a mark is not admitted at all in deeds requiring the statutory solemnities (a), even though it should appear to be the party's usual mode of signature. But custom has sanctioned such a mode of signature in bills and notes. In one case (b), it appeared that bills, to a considerable amount, subscribed by the party in this manner, had been habitually discounted by the Stirling Bank. Such documents thus subscribed have also been sustained from an early period. In a case reported by Lord Stair (c), of a reduction of a decree against the drawer of a bill for L.200 sterling, brought on the ground that there was merely a mark on it, with these words written round it in an unknown hand, "Archibald Johnstoun his mark," the Court ordered that, before answer, the oaths should be taken of the writer of the bill, if known, and also of the witnesses who saw Johnstoun subscribe the mark, or receive value for the bill. In this case there were no *subscribing* witnesses. Another case afterwards occurred between the same parties (d), regarding a bill likewise signed by the defender's mark, but before two subscribing witnesses. The defender did not appear. The subscribing witnesses deponed that he was "accustomed so to subscribe;" and one of them that "he saw him put this mark to the bill in question." Several others deponed, "that they had accepted such bills in regard of his custom, and had obtained payment from him without any debate thereupon." The Court, in respect of the specialties of the case (among which the circumstance of this being a bill among merchants, and of the defender's custom so to subscribe bills of greater importance, and his non-appearance, are particularly mentioned), sustained the bill; it being stated, however, that this was not to be a general rule. 'In a case where the signature by

Subscription
by mark.

(a) *Din v. Gillies*, 18 June 1812,
cited in a note to Fac. Rep. of *Weirs*
v *Ralston*, 22 June 1813.

(b) *Din v. Gillies*, note (a).

(c) *Brown v. Johnstone*, Feb. 1662,
M. 16802.

(d) *Brown v. Johnstone*, 1 Feb. 1669,
M. 16803.

mark was admitted, the Court did not allow a party who had been in the habit of so signing to escape from the obligation in the bill by saying that he had merely signed as cautioner (*a*).

‘It has been more than once decided that summary diligence is incompetent on a bill signed by mark. Where a bill was drawn and indorsed by mark, diligence by the indorsee against the acceptor was suspended; a motion that the drawer should be examined in regard to his signature being refused (*b*).’ In a later case (*c*), where summary diligence had been raised on a bill against a party who admitted that he had signed it by a mark before two subscribing witnesses, the Court suspended the diligence. But in an ordinary action they decerned against him, after production of certain letters signed by his mark, before witnesses, in which he acknowledged that value was given for the bill. This decision, however, may not perhaps have proceeded on the bill alone, but may have been also founded on the other written evidence produced (*d*). In an action (*e*) on a bill for L.5, signed by mark, without subscribing witnesses, the Court allowed a proof before answer that the party so subscribed it, and that this was his usual mode of subscribing. One of the judges (Lord Glenlee) alluded to the circumstance of the bill being for a sum below L.100 Scots. But the opinions of the majority of the Court appeared to go this length, that any bill signed by a mark (though not attested by subscribing witnesses) might be sustained as the ground of an ordinary action, if the fact of subscription was sufficiently proved. At the same time the interlocutor only allowed a proof before answer. One of the judges alluded to a case (*f*), in which the Court confirmed a sentence of the Sheriff of Lanarkshire, allowing a proof, before answer, of the indorsation of a *bank receipt* by a mark adhibited before subscribing witnesses.

(*a*) *Ker v. Riddel*, 28 June 1803, H. 50.

(*b*) *Stewart v. Russel*, 11 July 1815, F. C.

(*c*) *Cockburn v. Gibson*, 8 Dec. 1815, F. C.

(*d*) Reference was made in the pursuer’s pleadings in this case to a similar decision given with regard to a signature by a mark, in an unreported case, *Cameron v. Macfie*, 29 Jan. 1803.

In another unreported case, *William Russell*, 17 Dec. 1811, mentioned in the same pleading, the Court is said to have suspended a charge given on a signature by a mark; but one of the judges is stated to have expressed an opinion, that it might be the ground of an ordinary action.

(*e*) *Kennedy v. Watson*, 25 May 1816, F. C.

(*f*) *Lindsay v. Robertson*, Jan. 1815.

In a case (*a*) regarding indorsation by mark, before witnesses not subscribing, of a bill for L.5, the majority of the Court would have held this a bad title to the indorsee (distinguishing between such an indorsation, and the subscription of the drawer, if he had sued on the bill); but the right was held to be homologated by partial payments. In another case, when all the parties to a bill bearing to be signed by three acceptors were dead, the subscription of one of the acceptors by a mark, though not attested by witnesses, was allowed to be proved, and was held to be proved by facts and circumstances, as by her being in use to subscribe obligations by a mark, her having acknowledged the debt in the bill, etc. (*b*).

In an English undefended case (*c*), it was admitted, with some hesitation, as evidence of subscription by a mark, that the party had been in use so to subscribe, and that the witnesses pointed out some peculiarity in her subscription.

It is not easy to deduce a precise rule from the foregoing decisions. But it may be stated, 1st, that a bill or note signed by a mark in presence of subscribing witnesses will be sustained, 'if the signature be admitted (*d*), or' if the facts of the party's signature, and of it being his custom so to subscribe, are sufficiently proved (*e*); and, 2dly, that such a proof would probably be admitted, although there were no subscribing witnesses on the bill (*f*).

No summary diligence is competent on such documents when subscribed by a mark (*g*).

The subscription to bills or notes (except when by initials or by a mark) is received in evidence *per se*, without parole evidence, as in England, that the subscription is genuine. This rule applies in Scotland to bills and notes, in common with all those instruments which are either executed with the solemnities required by statute, or are, from favour to commerce, privileged with an exemption from them.

(*a*) *M'Ibreoch v. M'Intyre*, 2 Dec. 1826, F. C.

(*b*) *Craigie v. Scobie*, 23 Mar. 1832, 10 S. 510.

(*c*) *George v. Surrey*, 1 M. and Malk. 516.

(*d*) *Cockburn v. Gibson*, *Kerr v. Riddel*, *ut supra*.

(*e*) *Brown v. Johnstoun* (second case), *Lindsay v. Robertson*, *ut supra*.

(*f*) *Brown v. Johnstoun* (first case), *Kennedy v. Watson*, *ut supra*.

(*g*) *Stewart v. Russel*, *Cockburn v. Gibson*, *ut supra*.

Date.

(2.) Date of bills and notes.

The date of drawing a bill, or of granting a note, is generally marked in figures or in letters at the top of the bill or note.

Whether probative?

Such date is probative of the time of granting the bill or note. Thus, in an action brought on three accepted bills, by the person having right to them, against the acceptor's heir (*a*), who pleaded death-bed, the Court found, that accepted bills prove their dates against the acceptor's heirs, so as to exclude this plea. A similar decision is said to have been given in another case (*b*). It is stated by Bankton (*c*), that the bills in the first case, though drawn in Scotland, were accepted in London; and he doubts whether the same rule would be applicable to inland bills. Mr Erskine, too (*d*), doubts whether the rule would apply to such inland bills as are payable to the drawer. But the opinion of the Court, as now quoted, applies to all bills without exception; and it would rather appear from the reports, that the bills in question were payable to the drawer. Lord Bankton observes, that this was an action by an indorsee, and he doubts whether the same rule would apply to the payee. But the reports do not bear that the pursuer was indorsee, and he rather appears to have been in right of the original payee as his representative, in which case he was, of course, liable to all the exceptions competent against him (*e*). The Court, in a subsequent case (*f*), found (though after a contrary decision at first), that promissory-notes granted in Ireland, so as to affect heritage in Scotland belonging to the granter, could not prove their own dates, to the effect of excluding the plea of death-bed by the heir. But, 1st, This case affords a proof of the contrary rule being then applicable to all bills, since the heir admits it generally with regard to them; and, 2dly, Promissory-notes were not then, or for a considerable time afterwards, held entitled to all the privileges of bills (*g*). There is, on the whole, reason to believe (though the point does

(*a*) *Kennedy v. Arbuthnot*, 8 July 1725, M. 1477 and 12615.

(*b*) *Johnston v. Strachan*, 12 Feb. 1731, M. 12616.

(*c*) i. 13, 20.

(*d*) iii. 2, 25. Mr Ivory, in his note to this passage, thinks Erskine's doubt ill-founded.

(*e*) The case of *Christison*, Feb. 1734,

M. 12599, which Mr Erskine cites in support of his opinion on this subject, appears not to be applicable.

(*f*) *Norris v. Wood*, 4 Jan. 1743, M. 4466.

(*g*) *Vide More v. Paxton*, 9 Dec. 1766; *Greig v. Green*, 25 Jan. 1771, M. 12259; 12 Geo. III. c. 72.

not seem to have lately occurred), that all bills, as well as promissory-notes, being now on the same footing in respect of every other privilege, would likewise be held entitled alike to the privilege of proving their own dates, even to the exclusion of the plea of death-bed, and that whether in a question with indorsees, or with the original payees (a).

‘ In England the date is not held to be probative. It is taken merely as *prima facie* evidence, and the decisions assume that it may be impugned by parole evidence (b). In the case of a bill founded on by a petitioning creditor in bankruptcy, the bill is not even *prima facie* evidence of the genuineness of the date it bears (c).

‘ Where a bill has been issued without a date, it is competent to prove by parole evidence the true date at which such bill was issued. But such a bill does not authorize summary diligence (d).’

Bill issued
without date.

When a person signs a blank bill as drawer and indorser, and at the same time dates it, this date of drawing is to be considered as the date of the bill, at whatever time the blanks may be afterwards filled up (e). If the drawer leaves a blank for the date, and the payee fills it up with a date even previous to the time of issuing the bill or note, this date will be the rule of payment, at least in a question with an onerous holder, or with the payee, unless he is proved not to be an onerous holder ; because the drawer, by leaving a blank for the date, must be held to have authorized the holder to fill up any date, in the same manner as by subscribing a blank stamp he would authorize him to fill up to the full amount covered by the stamp whatever sum he chose. Thus (f) a person, by writ-

(a) It is doubtful whether Mr Thomson does not go too far in saying that the date is probative. The cases do not show more than that it is *prima facie* evidence. In *Kennedy v. Arbuthnot*, the defender rested solely on the technical plea that the date was not probative, and nothing is said as to what the decision would have been, had he offered evidence to show that the date was in point of fact fictitious. The English case of *Taylor v. Kinloch*, 1 Stark, 175, quoted in Mr Thomson’s last edition as corroborating his opinion, has been overruled.

(b) *Anderson v. Weston*, 6 Bing. N. C. 296 ; 9 L. J. (C. P.) 194 ; *Potez v. Glossop*, 1848, 2 Exch. 191 ; *Smith v. Battens*, 1834, 1 M. and Rob. 341.

(c) *Wright v. Lainson*, 1837, 2 M. and W. 739 ; *Sinclair v. Buggaley*, 4 M. and W. 312, 7 L. J. (Ex.) 305, overruling *Taylor v. Kinloch*, 1 Stark, 175.

(d) 19 & 20 Vict. c. 60, § 10.

(e) *Snaith v. Mingay*, 1 M. and S. 87.

(f) *Russell v. Langstaff*, 2 Dougl. 514.

ing his name as indorser on certain copperplate checks drawn in the form of promissory-notes, but blank in the date, sum, and term of payment, has been held to have authorized the person to whom he gave them to fill up what dates and sums he chose, so as to found a good action at the instance of an onerous holder; and in another case (*a*), where a bill, with a blank for the date and sum, had been drawn on 28th February by one of the partners of a company, and also blank indorsed by him under the company's firm, and the clerk of the company had, after his death, and after a new company was formed, filled up the blank for the date with 27th February, and likewise the sum, after which the bill was discounted to a third party, this third party was found to have a good claim on it against the surviving partners.

'In the hands of an innocent onerous indorsee a bill is good though the date may not have been filled up for years after the issue. Thus a bill issued blank in the date was issued in 1840, but was not filled up by the payee till 1852. It came into the hands of an innocent holder for value, and it was held incompetent for the acceptor to plead against him, either that the bill had not been filled up within a reasonable time, or the statute of limitations (*b*). The effect of these pleas against the original payee does not appear to have been decided; but it is probable that they would be held good against him (*c*).

Erroneous
date.

'An error in the date of a bill does not affect its validity, unless it be proved that the error was made with a fraudulent design (*d*).'

Bill dated on
Sunday.

It does not appear that a bill or note dated on Sunday would be void. In Scotland, a distinction seems to have been taken between judicial and private acts performed on Sunday; it being held, that "acts of private parties on the Sabbath-day might stand legally valid;" but that "judicial acts, *auctoritate judicis*, are null" (*e*). The functions of courts of justice being suspended on Sunday by law, acts proceeding under their authority cannot be legally performed on that day. Diligence executed on Sunday is therefore null (*f*), excepting the execution of *meditatio fugæ* warrants, from

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| (<i>a</i>) <i>Usher v. Dauncey</i> , 4 Camp. 97. | (<i>d</i>) <i>M'Laren v. Fisher</i> , 1838, 16 S. |
| (<i>b</i>) <i>Montague v. Perkins</i> , 1853, 22 | 1279; <i>Yeats</i> , 1833, 11 S. 915. |
| L. J. (C. P.) 187. | (<i>e</i>) <i>Oliphant v. Douglas</i> , 3 Feb. |
| (<i>c</i>) <i>Temple v. Pullin</i> , 1853, 22 L. J. | 1662, Morr. 15002. |
| (Ex.) 151. | (<i>f</i>) Morr. 15001-4. |

the necessity of the case, and perhaps from the circumstance of their being in some measure criminal warrants (*a*). On the other hand, there does not seem to be any law invalidating the secular acts of private individuals performed on Sunday. It has been therefore decided, that a bond executed on Sunday was not objectionable (*b*); and the same rule is applicable to bills. In one case (*c*), where a company who had accepted a bill on Sunday pleaded this as an objection against an onerous indorsee, the objection was repelled by the Lord Ordinary, and the parties acquiesced in his judgment. 'In another case, the objection that a bill was drawn on a Sunday was repelled, and opinions were given, indicating that an acceptance on a Sunday would also be held good (*d*). The statute 1579, c. 70, prohibiting "handie-labouring and working" on the Sabbath, which has sometimes been referred to (*e*) as prohibiting the execution of bills on Sunday, has obviously no application.'

In England, likewise, the doctrine now stated appears to be recognised at common law; for in some questions as to the validity of sales on Sunday (*f*), the party objecting relied chiefly on the application of certain English statutes to the case. 'It has been held, that a bill might be drawn upon Sunday (*g*); and an opinion has been given, that, except in the case of the signing of the acceptance falling within the ordinary calling of the acceptor, a bill may likewise be accepted on Sunday.' It was also held that the acceptance could not be presumed to have been made on Sunday merely because the bill bore date on that day, but that, according to the usage of merchants, the contrary must be presumed (*g*).

It has been decided in England (*h*), that, when a bill was dated seven days after the time of drawing it, and made payable sixty-five days after date, and when the payee, after indorsing it to a third party, died before the arrival of the date of drawing inserted in the bill, the bill was, notwithstanding, transferable, and was

Post-dating of
bills.

(*a*) *Kemp v. his Creditors*, 16 Jan. 1786, *Morr.* 8554.

(*b*) *Duncan v. Bruce*, March 1684, *Morr.* 15003; *Yeats*, 1839, 11 S. 915.

(*c*) *M'Pherson and Co. v. Gray*, Summer Session 1824, before Lord Mackenzie.

(*d*) *Elliot v. Faulke*, 20 Jan. 1844, 6 D. 411.

(*e*) *Menzies on Conveyancing*, 3d ed., p. 334.

(*f*) *Drury v. De la Fontaine*, 1 Taunt. 131; *Bloxome v. Williams*, 5 D. and R. 82. But *vide Fennell v. Ridler*, 8 D. and R. 204.

(*g*) *Begbie v. Levy*, 1 Cr. and Jerv. 180.

(*h*) *Pasmore v. North*, 13 East, 517.

effectually transferred by the payee during the interval, so that the indorsee had a good action against the drawer. The date is not material in any case, except as regulating the term of payment; and in this case, where the bill had been post-dated with that view, the Court held that the term of payment must bear reference to the date in the bill, being thus as well ascertained as if it had been made seventy-two days after the actual date. It follows from this decision, that a bill or note post-dated would be valid, though the drawer or maker should die before the arrival of the date inserted in it. Indeed, this power of post-dating at common law appears to have been recognised by the statutory restrictions imposed on it, 'when short-dated bills were liable to smaller stamp-duties,' as also by an enactment in 17 Geo. III. c. 30, made perpetual by 27 Geo. III. c. 16, and confirmed by 7 Geo. IV. c. 6, § 4 (which, however, is applicable exclusively to England), bearing that indorsements of bills, notes, checks or drafts for sums below L.5, shall bear date at or not "*before the time of making thereof, and not on any day subsequent thereto*" (a).

Place of
making.

(3.) Place where the bill or note is made.

It is proper for the maker of a bill or note to write on it the name of the place where it was made, and likewise (if he is not well known) to add his own residence, that the holder may find him out when necessary. But this is not indispensable. The insertion of the place of making is required, in certain cases (b), in bills and notes for sums below L.5.

The sum.

(4.) The sum.

Mode of ex-
pressing.

The sum must be written distinctly in the body of the instrument. It is usually expressed there in words; and it is common and advisable, though not indispensable (c), to superscribe the sum also in figures. If there be any discrepancy between the words and the figures, the former ought to be the rule, although the letter of advice should agree with the figures (d). 'Accordingly, where a bill was granted in the body for "two hundred pounds," written

(a) *Vide* Lord Ellenborough's opinion in *Pasmore v. North*, 13 East, 520. An enactment, 8 & 9 Vict. c. 38, § 17, made provisions similar to those of the 7 Geo. IV. c. 6, § 4, applicable to Scotland, but is now under suspense

for three years, by 26 & 27 Vict. c. 105.

(b) 17 Geo. III. c. 30; 8 & 9 Vict. c. 38, § 17. See note (a).

(c) Beawes, No. 3, v. Bills, 563, ed. 1813; Marius, 139.

(d) Marius, *ibid.*; Forbes, 42.

in words, the Court disregarded the figures "L.245," written on the margin, and refused to admit parole evidence to show that the larger was the correct sum (a). But, on the other hand, the sum marked on the margin may sometimes explain an ambiguity in the words inserted in the body of the bill or note (b). In drawing a check on a banker, the sum is generally subscribed or superscribed. 'A bill for ten "pound," in place of pounds, has, of course, been sustained (c).' It has been held in England (d), that a bill for "Twenty-five" seventeen shillings and threepence, may be declared on as for twenty-five pounds seventeen shillings and threepence. 'In the case of a similar bill in Scotland, it was held (by a narrow majority, however), that such a bill was not only good, but authorized summary diligence (e).' The word "Sterling," or any equivalent word, is held to mean English money or currency (f).

If a person signs his name, as maker, drawer, acceptor, or indorser to a bill or note in which the sum is left blank, he is liable for whatever sum the holder chooses to fill up (g); and if he subscribes a blank bill stamp, he will be liable for the highest sum (when filled up) to which the stamp is applicable (h). 'The blank may be filled up at any time (i), and will be good in the hands of an innocent holder for value, though it should be filled up for a larger sum than was intended by the granter. Against the original grantee,

Sum left blank.

(a) *Saunderson v. Pyper*, 1839, 5 Bing. N. C. 425.

(b) *Vide Elliot's case*, 2 East's P. C. 951, where, on an indictment for forging a note, which promised to pay on demand the sum of Fifty,— "L. fifty," however, being written on the margin,—the judges, on a case reserved, held that the words "L. fifty" proved beyond a doubt that the word "fifty" in the body of the note had been intended for fifty pounds.

(c) *Rex v. Post*, Russ. and R. Crown C. 101.

(d) *Phipps v. Tanner*, 5 C. and Pay. 488.

(e) *Gordon v. Sloss*, 1848, 10 D. 1129.

(f) *Lansdowne*, 2 Bligh, 87; *Kearney v. King*, 2 B. and Ald. 301.

(g) This was decided in *Russell v. Langstaff*, 1780, Doug. 514, with reference to promissory-notes; and in *Usher v. Dauncey*, 1814, 4 Campb. 97, with reference to bills. *Vide* also the opinion of Lord Ellenborough to the same effect in *Powell v. Duff*, 3 Campb. 182, and *Bulkely v. Butler*, 2 B. and C. 425, where a bill was held good, though the sum was not filled up till after the bankruptcy of the acceptor.

(h) In *Collis v. Emmett*, 1 H. Bl. 313, a person who signed a blank bill stamp was found liable for the sum filled up, without objection on this ground, though another point was much discussed. The point is likewise said to have occurred in *Little v. Muir*, 23 Feb. 1803, Bell's Comm. i. 390, note 5.

(i) See cases cited (b) and (c), p. 38.

it is competent to offer proof that a different sum from that intended has been filled up, and where suspicious circumstances are stated on the record, proof may be permitted *prout de jure* (a).'

Sum so written
as to be capable
of being en-
larged.

In the same way, if any person subscribes a bill or note, where the sum is written in such a manner, or such blanks are left, as allow it to be altered to a larger sum, without giving the document that suspicious appearance which would attract the notice of a person exercising ordinary diligence, the subscriber will be liable to any *bona fide* holder for the increased sum (b). The principle of this doctrine appears to be, that the parties to the bill or note, by drawing or subscribing it when in such a state as to enable the holder to alter the sum without risk of detection, have led third parties to believe, either that the increased sum was that inserted in the document at the time of drawing it, or that *the whole* sum was inserted afterwards, by virtue of an implied authority, in a blank left for the purpose. With the actual authority given, third parties have nothing to do; they are concerned only with the obligation presumable *ex facie* of the bill, which the debtor has sanctioned by his signature. In the first of the cases now cited, the Court, adopting this doctrine, sustained, both against the acceptor and indorser to the full extent, a bill in which the sum had been altered from "eight" to "eighty-four" pounds; there being so much room for the alteration, that it was made without giving the bill a suspicious appearance. In the second case cited, there being two bills,—one in which the words "four hundred and" had been added before "fifty-eight," without appearing suspicious, and the other, in which an alteration had likewise been made in the sum, but so as to have a crowded appearance,—the Court sustained the first bill against the acceptors to the full amount, in a question with an onerous holder, but found the other bill, at first, good only for the original sum, and, on a reclaiming petition, suspended the charge on it altogether.

If the sum in a banker's check has been altered without the drawer's fault, but with such dexterity that the alteration may escape

(a) *Anderson v. Lorimer*, 21 Nov. 1857, 20 D. 74.

(b) *Vide* Pothier, c. 4, §§99-101, who discusses this matter very fully: also *Pagan v. Wylie*, 19 June 1793, Morr.

1660; *Graham v. Gillespies and Co.*, Jan. 1795, Morr. 1453. A similar

point was decided on the same grounds, by the Court of Common Pleas, in *Young v. Grote*, 4 Bingh. 253.

the notice of a third party, a banker paying the amount as altered will have no claim against the drawer except for the original sum, seeing it was only *for this sum* that he gave an order, and interposed his obligation (a). ‘And clearly, if the sum, altered without the drawer’s fault, be altered in so clumsy a manner, that it ought to have excited the banker’s suspicion, the banker will be without recourse (b).’

As already shown (*ante*, p. 11), the sum, when inserted, must be precisely fixed. Sum must be precise.

‘The Scotch Currency Act, 8 and 9 Vict. c. 38, § 17, required bills for sums of 20s., and below L.5, to be drawn in a certain form. The enactment, which remained unenforced, has been suspended by the 26 and 27 Vict. c. 105, for three years, preparatory, it is believed, to its repeal. The Currency Act, § 16, makes negotiable bills for sums below 20s. of no effect.’ Sums below L.5.

(5.) Term of payment.

There is no reason to think that bills or notes must, in this country (as in France) (c), contain a precise term of payment. If no term is specified, they are considered in England (d), and would probably be considered here, as payable on demand, as checks on bankers always are, though they do not specify a term of payment (e). It is advisable, however, to specify the term of payment; and this ought to be done in words. Term of Payment.

Parties may agree on any term of payment they choose, subject, however, to the restrictions already explained (*ante*, p. 11). Bills, whether foreign or inland, may be made payable at a certain specified date, or at sight, or on demand, or a certain time after sight, or after date. Foreign bills are generally drawn payable at one or more usances. A foreign bill payable at sight will be payable according to the course of exchange at the time when it is presented to the drawee, unless it bears expressly to be payable according to the course of exchange at the time of making it (f).

(a) *Hall v. Fuller*, 1826, 5 B. and C. 750. *Vide* also Pothier, *Contrat de Change*, §§ 99–103.

(b) *Watson v. Thomson and Co.*, 1798, H. 42.

(c) *Vide* Nougier, § 100.

(d) *Whitlock v. Underwood*, 3 D. and R. 356; 2 B. and C. 157.

(e) *Boehm v. Stirling*, 7 T. R. 423–30.

The doctrine stated in the text is to be received as applicable to Scotland with some caution, as Lord Ardmillan has held (*Braid v. Linton*, 1858, 20 D. 731), that a document promising to repay a sum lent, with interest, but without specifying any term of payment, was not a promissory-note.

(f) Pothier, No. 174.

In the case of a promissory-note for money lent (*a*), when interest at a certain rate was made payable to the date of acceptance, this was interpreted to mean *till sight*.

Payment by instalments.

‘Bills may be made payable by instalments (*b*); and it is competent to insert a condition, that if any of the instalments shall not be paid when due, the whole sum shall be exigible (*c*). It is not competent, however, to make payment of any of the instalments uncertain (as, for example, to make a condition that instalments are not to be payable after the death of the acceptor (*d*)), this just having the effect of rendering the sum uncertain.’

The rules which determine the time when bills or notes become due shall be afterwards considered.

Place of payment.

(6.) Place of payment.

It is not indispensable to specify the place of payment in a bill or note. Beawes (*e*) observes, that the place of payment, as well as the drawee’s residence, must be specified in the superscription or body of a bill. But the former is not now considered essential, although the drawee’s place of residence is generally set forth in the address to him. It may, however, be presented to him, either at his residence, or personally anywhere (*f*). The effect of a specification of the place of payment in a bill or note, or in a memorandum to the bill or note, or annexed to the acceptance of the bill (the last of which points has been the subject of much controversy in England), shall be afterwards particularly considered.

Request to pay.

(7.) Request to pay.

The request to pay must be made as a matter of right (*g*). It is said (*h*) that the direction to pay the money need not be in the body of the bill, or even on the same side of the paper. But this doctrine appears to be founded on a misapprehension of a passage in Marius (*i*), which relates only to the *address*, or, as he calls it, the *direction* to the drawee. In Scotland, the direction to pay must be in

(*a*) *Sutton v. Toomer*, 7 B. and Cr. 416.

(*b*) *Orridge v. Sherborne*, 11 M. and W. 374; 12 L. J. (Ex.) 313, removing doubts entertained in *Carron v. Muirhead*, 1796, M. 1457.

(*c*) *Carlton v. Kenealy*, 12 M. and W. 139; 13 L. J. (Ex.) 64.

(*d*) *Worley v. Harrison*, 1835, 3 Ad. and E. 669.

(*e*) No. 3, on Bills of Exchange.

(*f*) *Vide post*, on Presentment.

(*g*) *Ante*, p. 6.

(*h*) Argument in *Brown v. Harra-*
den, 4 T. R. 149.

(*i*) Page 44.

the body of the bill, because otherwise the subscription of drawer or acceptor would not necessarily refer to it; and there seems to be no good reason for holding that the rule is different in any other country.

(8.) Bills drawn in parts.

Bills drawn in parts.

In inland bills, the request to pay is absolute, and likewise in foreign bills, with a single exception. This exception arises from the circumstance that foreign bills generally consist of several parts (composing what is called a set), in order that, although one should be lost, the bearer may recover payment on the other. *Each part* ought to contain a condition, that it is to be payable only if the other parts should remain unpaid (*a*). For, if a person should omit this condition in the first part, and insert it in the second only with reference to the first, and only in the third with reference to the preceding two (which is the plan recommended by several writers), he might perhaps be obliged to pay each; since it would be no defence against a *bona fide* holder of the second that he had paid the third, or of the first that he had paid either of the others (*b*). It has been said (*c*), however, that if any of the parts has been omitted in the enumeration through an evident mistake,—for instance, if a bill should run thus, “Pay this my first bill of exchange, *second* and *fourth* not paid,”—the mistake will be corrected by supplying the *third* part. It has been decided (*d*) that, although a person who gets one of the parts of a bill into his hands should recover payment from the debtor by forging an indorsement from the payee to himself, the real payee is, notwithstanding, entitled to recover on the other part.

It has been decided (*e*), that when the drawee (who was also a member of the company that was payee) of a foreign bill indorsed one part as a security to a third person, and afterwards accepted another part, and indorsed it to a different person, but the part first indorsed was restored, on a different security being substituted for

(*a*) Bayley, 28.

of separate onerous holders, an action was competent on each against all the several obligants.

(*b*) This principle was recognised in an appeal from the Court of Session, *Davidson v. Robertson*, 1815. 3 Dow, 319, where the House of Lords decided, that, if two bills (though relating to the same transaction) were made payable absolutely, without reference to each other, and got into the hands

(*c*) Bayley, 29.

(*d*) *Cheap v. Harley and Drummond*, 2 Camp. 18, cited 3 T. R. 127.

(*e*) *Holdsworth v. Hunter*, 10 B. and Cr. 449.

it, the indorser of the other part had a good action on it against the drawee. ‘An agreement to deliver certain foreign bills is not fulfilled by delivering one part alone of each bill, even though the delivery should be accompanied by a guarantee against demands on the other parts (*a*). If an indorsee receive one part of a foreign bill and lose it, he may have an action against his own indorser to deliver the remaining parts; but he has no such action against a prior indorser (*b*).’

Address of
drawee.

(9.) Address of drawee.

As a bill is a request to a third person, his address ought to be written on it. The want of an address, however, may be supplied by acceptance, which is held to imply that the acceptor is the party for whom the bill was intended (*c*). It has been held (*d*), that, when a bill was addressed to A as drawee, or, in his absence, to B, and A only accepted, an action was good against A upon his acceptance, without noticing B. On the other hand, when a bill was addressed to one person only, and another person accepted along with him, it has been decided in England (*e*), that there could be no action against the last of these persons *as acceptor*, it being held contrary to the custom of merchants that there should be a series of acceptors. ‘But if a person sign a bill addressed to another, either alone, or along with the proper drawee, he may render himself liable either as for a tort (*f*), or as on a collateral undertaking (*g*).’ Where a person having subscribed a bill “as cautioner,” along with two other parties, although it had not been addressed to him, he was found liable with the other acceptors for its full amount (*h*). It may perhaps be questioned whether this last decision was consistent with the Stamp Acts, seeing that the addition of a new obligant seems to create a different obligation, which requires a new stamp (*i*).

(*a*) *Kearney v. West Granada Mining Co.*, 1856, 1 H. and N. 413.

(*b*) *Pinard v. Klockman*, 16 Jan. 1863, 32 L. J. (Q. B.) 82.

(*c*) *Grierson v. Sutherland*, 28 June 1727, M. 1447. The same point has been decided in England in the case of *Gray v. Milner*, 3 Moore, 90, where the place of payment merely was specified in the usual place of the address.

(*d*) 12 Mod. R. Anon. *per* Holt, C. J.

(*e*) *Jackson v. Hudson*, 2 Camp. 447, *per* Lord Ellenborough; *Davis v. Clark*, 24 May 1844, 12 L. J. (Q. B.) 305.

(*f*) *Polhill v. Walter*, 3 B. and Ad. 114, 1 L. J. (K. B.) 92.

(*g*) *Jackson v. Hudson*, 1810, 2 Camp. 447; compare *Penny v. Innes*, 1834, 1 Cro. M. and R. 439.

(*h*) *Macdougall v. Foyer*, F. C., 13 Feb. 1810.

(*i*) *Vide* the opinion expressed by

(10.) Directions to pay *per* advice.Bills payable
per advice.

Bills are sometimes drawn payable as *per* advice, in which case the drawee cannot safely accept or pay till he receives a letter of advice, and finds that it tallies with the directions in the bill (*a*). On the other hand, if the bill contains the words, "without further advice," or if (as is now more usual) it says nothing on the subject, it is a sufficient authority in itself to the drawee to accept and pay. It has been said, on the authority of Scaccia (*b*), that, if the drawee should pay a bill drawn as *per* advice, *supra* protest, for the honour of the drawer, before receiving the letter of advice, he will have a good claim against the drawer. But the passage cited relates only to the ordinary claim of a drawee who accepts *supra* protest; whereas the case of a bill drawn "as *per* advice" appears to form an exception to the common rule, since the drawer thereby requests that the drawee may not accept till the letter of advice arrives. If he accepts, in such a case, either *supra* protest, or simply, he does so at his own risk, seeing it is contrary to the drawer's orders.

(11.) Direction to place the sum to account.

Place to
account.

This is now seldom used in bills. It is said (*c*), that when the drawer is to be himself the debtor, he adds to the request to pay, the words, "and place it to my account;" that when the drawee is his debtor, he uses the words, "and put it to your account;" and that, when a third person is debtor to the drawer, these words are used, "put it to the account of such an one." But none of these words are necessary to the validity of the bill. This has been decided in a case, where parties who had engaged to accept bills for the plaintiff were found not entitled to refuse acceptance, because he had not specified to which of two accounts they should be placed, it being held, in such a case, that they might place the bills to either of the accounts they chose (*d*).

(12.) Name of payee.

Name of payee.
How payee de-
signed.

No bill or note is complete, unless the payee be pointed out, either by name or by description, as by these words, "Pay to the bearer." Though his name only, without designation, should be

Bayley, J., in *Clark v. Blackstock*,
Holt, 474; and *M'Ara v. Watson*,
1823, 2 S. 360.

(*b*) Scaccia, 2 Gloss. 5, No. 358.

(*c*) Marius, 27.

(*d*) *Laing v. Barclay*, 1 B. and Cr.

(*a*) Chitty, 311; Malyne's Lex Mer-
cat. Part 3, c. 6, obs. 8. 398.

given, his possession of the bill will supply that deficiency (*a*). As already shown (*b*), a note payable to one person or to another cannot be sued on as a promissory-note, in respect that the promise is conditional. A learned French author (*c*) suggests, that if a bill, though it does not specify the payee, mentions value received of a particular "person," that person should be presumed to be the payee. 'Effect has been given to that presumption in this country, where it has been held that a note, running, "Received from A B L.40, payable on demand," was a promissory-note payable to A B (*d*).'

Descriptive
designation.

'The decisions have gone very far towards altogether prohibiting the designation of the payee by description. Thus, a direction to pay to the secretary of a particular company for the time being, has been held inconsistent with the nature of bills, as involving a "floating promise," and requiring investigation to discover the payee (*e*). If, however, the designation be enough to identify a particular individual and no other, as, for example, to the "secretary of a company," it would appear that that would be interpreted as payable to the individual who was secretary at the time the note was granted (*f*). A note directing payment to the trustees acting under a certain will, without naming any of them, was sustained,—no objection, however, having been taken on that particular ground (*g*); and a bill payable to certain trustees, and naming three, but not all of them, was sustained, though objected to as insufficient (*h*).'

Blank in the
payee's name.

A bill or note left blank in the payee's name is not complete till

(*a*) Ersk. iii. 2, 26.

(*b*) *Blackenhagen v. Blundell*, 2 B. and A. 417; *ante*, p. 12.

(*c*) Pothier, No. 31.

(*d*) *M'Gubbin v. Stephen*, 9 July 1836, 18 D. 1224.

(*e*) *Cowie v. Stirling*, 1 May 1856, 25 L. J. (Q. B.) 335. The note was payable to "the secretary for the time being of the Indian Laudable and Mutual Insurance Company or order." In the subsequent case of *Yates v. Nush*, 30 May 1860, 29 L. J. (Q. B.) 306, the bill was payable to the order of "the treasurer for the time being of the

Commercial Travellers' Benevolent Society."

(*f*) Compare the preceding cases with *Soares v. Glyn*, 1845, 8 Q. B. 24, 14 L. J. (Q. B.) 313. See also *Fraser v. Bannerman*, 21 Nov. 1853, 15 D. 756, where, though summary diligence was refused on a bill payable to "the agent of the North of Scotland Bank at Macduff," it was conceded that the bill would be good in an ordinary action.

(*g*) *Meggison v. Harper*, 2 Cr. and M. 322; 3 L. J. (Ex.) 50.

(*h*) *Watts v. Pinkey*, 21 Dec. 1853, 16 D. 279.

the blank is filled up (*a*), though, in England, any person who appears *aliunde* to be in right of the document may sue for its amount. After such a bill or note has been made and issued, any *bona fide* holder may fill up his own name as payee (*b*). It would appear that the drawer, by signing a bill blank in the payee's name, creates a presumption, as he would do by indorsing it blank, that any person who fills up the blank with his own name, does so by his implied authority. Indeed, it has been already shown (*c*) that a person, by subscribing a blank bill stamp, becomes liable for any obligation (conformable with the amount of the stamp) which is afterwards filled up in it. A proof of fraud in filling up the payee's name would be relevant (*d*). But, 1st, this could be pleaded only against the party guilty of it, not against his onerous indorsee; and, 2dly, even in a question with the person who filled up the payee's name, it must be presumed, unless the contrary be proved, that he was authorized to fill it up.

It is said, that, in England, if a payee's name be wrong spelled, parole evidence will be received to show who was intended; and reference is made to a case (*e*), where such evidence was admitted, to prove that "Elizabeth Willison," the name inserted as payee, meant "Elizabeth Willis." Such a proof might be admitted here also, in an ordinary action; but the bill or note could not be the ground of summary diligence at the instance of the *intended* payee, or of any person to whom she might indorse it by her proper name. In a case (*f*), where a person called Henry Davis was payee, and

Error in
payee's name.

(*a*) *Rex v. Randall*, Russ. and Ry. 196, where a person having been convicted of forging a bill of exchange, payable to _____, the Twelve Judges, on the ground stated in the text, recommended an application for pardon. *Vide also Rex v. Richards*, Russ. and Ry. c. c. 193.

(*b*) *Cruchley v. Clarence*, 2 M. and S. 90. In an action by such an indorser against the drawer, it was held, that "the issuing the bill in blank without the name of the payee, was an authority to a *bona fide* holder to insert the name." *Per Bayley, J.* The opi-

nions given by the other judges are to the same effect. *Lyon v. Butter*, 1841, 4 D. 178; *Grassick v. Farquharson*, 1846, 8 D. 1073; *Disher v. Kydd*, 1810, H. 64; *Smith v. Taylor*, 1824, 2 S. 755.

(*c*) *Ante*, p. 41.

(*d*) *Vide Andrew v. Buick*, 21 June 1821, 1 S. 78; *Awde v. Dixon*, 23 June 1851, 20 L. J. (Ex.) 295; *Hood v. Darling*, 1808, H. 59.

(*e*) *Willis v. Barret*, 1816, 2 Stark, 29.

(*f*) *Mead v. Young*, 4 T. R. 28.

another person of the same name indorsed the bill for value to the plaintiff, the Court of King's Bench held it competent to prove this fraud even against the plaintiff; their opinion being, that the indorser had committed a forgery, and that the plaintiff could not derive a title through forgery. Such a bill, being unexceptionable *ex facie*, would afford a good warrant in Scotland to a *bone fide* holder for summary diligence. But the facts now stated would be sufficient to suspend the diligence, there being the same want of title in the indorser, on whose right that of the holder depends, as if he had impetrated a bill to himself by force. Where both father and son have the same name, a bill or note taken payable in that name will be presumed, unless the contrary appear, to be meant for the father (*a*). It is sufficient that the bill or note affords means for ascertaining who was intended as payee, though the description given of him be not quite accurate (*b*).

Bills payable
to bearer.

A bill or note may be made payable to the bearer (*c*), and in that case it is transferable by delivery. If it be made payable to "ship Fortune, or bearer," or if any other name plainly fictitious be prefixed (*d*), the bill or note will be considered as payable to the bearer, and the fictitious name will go for nothing. In France, bills payable to bearer, though at one time allowed (*e*), are now prohibited (*f*). In Scotland, it was at one time decided (*g*), that a

(*a*) In *Sweeting v. Fowler and Another*, 1 Stark, 106, Henry Sweeting, the son, having sued upon a note made payable generally to "Henry Sweeting," Bayley, J., held, that the father, whose name also was "Henry Sweeting," must be presumed to be meant. But, it being proved that the son held the bill, and had given instructions to bring the action, these facts were accounted sufficient to obviate the presumption. As the bill afforded no evidence that there was such a person as the father, the son, being creditor *ex facie* of it, would, in Scotland, have been entitled to summary diligence; and if a suspension had been brought on the ground that the father was meant, the facts now stated would probably have been held sufficient to prove the contrary. The principle was

again applied in *Stebbing v. Spicer*, 8 C. B. 827; 19 L. J. (C. P.) 24.

(*b*) In *Rex v. Box*, 6 Taunt. 325, a person being convicted of forging a note payable to two ladies, described therein as stewardesses of a certain society; and it being stated, in arrest of judgment, that they had no legal right to that character, the Twelve Judges, notwithstanding, held that this was a promissory-note, and that consequently the conviction was good, seeing that the payees were generally known by the description therein given to them.

(*c*) *Grant v. Vaughan*, 3 Burr. 1526.

(*d*) *Ibid.*

(*e*) Pothier, No. 224.

(*f*) Pardessus, No. 89, p. 82; Noguier, § 139.

(*g*) *Walkinshaw's Exec. v. Campbell*, 8 Jan. 1730, M. 1684.

bill payable to the bearer was not obligatory. But it has been already shown, that the Act 1696, against blank writs, under which this judgment was pronounced, is held now to be inapplicable to bills.

It was long disputed in England, whether the onerous indorsee of a bill drawn payable to a fictitious person "or order," and indorsed in name of this fictitious person by the party so drawing it, was entitled to recover on it as a valid bill. It was held that the indorsement could not be effectual as such, because it was a forgery; there being no such party as the pretended indorser. But it was said, that in an action against the parties privy to the fraud, an 'innocent' (a) onerous indorsee was entitled to sue on the bill as payable "to the bearer." This was decided in a question with the acceptor, in four different cases (b); and the same decision was given in an action against the drawer (c), on the ground that, by signing a blank bill stamp, he had empowered the holders to fill it up in what manner they pleased, and had thus given currency to the bill in question, which was filled up in the manner now stated. The case was afterwards brought under review of the House of Lords by a writ of error (d), when their Lordships, after taking the opinions of the Twelve Judges, decided, in an action by an onerous indorsee against the acceptor (he being privy to the fraud at the time of his acceptance), that the bill was to be construed as payable "to the bearer." The same principle was followed by the House of Lords in another case (e) (which was likewise an action brought against the acceptor of such a bill), on similar grounds to those now stated. It would appear, from a subsequent case (f), that Lord Ellenborough's

Fictitious
payee.

(a) *Hunter v. Jeffrey*, 1797, Peake, Ad. C. 146.

(b) *Vere v. Lewis*, 3 T. R. 1824; *Stone v. Freeland*, 1 H. Bl. 316, note. In the last case, however, though Lord Mansfield expressed an opinion to the effect now mentioned, the decision proceeded on a promise of payment by the defendant. *Tatlock v. Harris*, 3 T. R. 174; *Minet v. Gibson*, 3 T. R. 481. In these two cases, the acceptors were held liable under the count for money had and received, as they were considered to have received the amount of the bill for behoof of any party who might become

the holder. In the case of *Vere v. Lewis*, the majority of the Court likewise held, that the plaintiff might recover as on a "bill payable to bearer."

(c) *Collis v. Emmett*, 1 H. Bl. 313.

(d) *Gibson v. Minet*, 1 H. Bl. 569. Lord Chancellor Thurlow against the judgment of the Court below; Lords Loughborough, Bathurst, and Kenyon, for it. Eyre, C. B., and Heath, J., gave their opinions against the judgment, which was affirmed.

(e) *Gibson v. Hunter*, 2 H. Bl. 187.

(f) *Bennett v. Farnell*, 1 Campb. 130, and Addenda, p. 180, No. 9.

opinion was not very favourable to the judgment of the House of Lords. In that case, which was an action by the onerous indorsee against the acceptor of a bill made payable to a person described as fictitious, "or his order," but without stating that the defendant knew this circumstance at the time of accepting, Lord Ellenborough non-suited the plaintiff, holding that the bill could not be construed as payable to the bearer, and that the plaintiff could not claim under the order of the alleged payee, seeing there was no such person (*a*). A rule *nisi* for a new trial was refused, because no evidence had been offered to show that the acceptor knew, at the time of his acceptance, that the payee was fictitious. Lord Ellenborough stated, that, if there had been such proof, he would have directed for the plaintiff, under the authority of the previous cases, by which, he said, that he conceived himself bound, "though by no means disposed to give them any extension."

The signing or indorsing of a bill or note in name of a fictitious person amounts to forgery (*b*).

Other modes
of designing
payee.

A bill may be taken payable to the drawer himself (*c*), as well as to a third party. 'And a promissory-note may be made payable to the maker or order; and if indorsed blank, becomes payable to bearer (*d*).' It may also be taken payable to one person for behoof of another (*e*).

Payable to
order.

(13.) Payable to order.

A bill or note, unless when made payable to the bearer, is generally taken to the payee, "or order." In Scotland it has been long settled (*f*), that the words "or order" are not necessary, and

(*a*) Reference was made, in the argument for the defendant, to another case, *Weare v. Taylor*, 1805, wherein Lord Ellenborough is said to have expressed a similar opinion, and to have also stated that the previous cases had been very much doubted.

(*b*) Hume on Crimes, vol. i. p. 138, and Bell's Notes, p. 50; *Rex v. Toft*, 1 Leach, C. L. 172.

(*c*) *Per* Holt, C. J., in *Butler v. Cripps*, 1 Salk. 130; — *v. Ormston*, 10 Mod. 186. The document in such a case is said to be more of the nature of a promissory-note.

(*d*) *Wood v. Mytton*, 10 Q. B. 805, 16 L. J. (Q. B.) 446.

(*e*) *Evans v. Cramlington*, Carth. 5. In *Smith v. Kendal*, 6 T. R. 123, a promissory-note was sustained, which had been taken payable to one person in trust for another. In *Marchington v. Vernon*, 1 Bos. and Pull. 101, note *c*, action was sustained at the instance of the holder of a bill against the drawer's assignees, by virtue of a promise which they had made to the drawer to accept the bill, on the ground that he had a right to enforce this promise, seeing that it was made for his behoof.

(*f*) *Crichton v. Gibson*, Jan. 1726, Morr. 1446.

that a bill or note may be effectually indorsed without them by the payee. In England it has been held, that the indorsation of a bill or note wanting these words does not give the indorsee a good claim against any of the previous parties to the document, excepting his own immediate indorser (*a*). But such a document has been decided to be a good bill or note in the hands of the original payee, seeing he has a claim upon it independently of the right of indorsing it (*b*). A bill or note payable to "the order of" a certain person, has been held (*c*) to give him a good right to sue upon it, as well as to indorse it.

(14.) "For value received."

"Value received."

Though bills or notes generally bear to be granted "for value received," it is now settled that these words are not necessary, either in granting or indorsing them (*d*). In England the same rule is established (*e*), although it is advisable there to insert the words "value received" in inland bills or notes, as this is necessary, by statute, to enable the holder of them to recover damages from the drawer or acceptor, in case of non-acceptance or non-payment (*f*). It has been held in England, that the words "value received" in a bill made payable to a third party, or in a note (*g*), naturally imply that the payee has given value to the drawer (*h*), and that, in a bill made payable to the drawer himself, they imply that he has previously given value to the drawee (*i*).

(*a*) *Hill v. Lewis*, 1 Salk. 132, per Holt, C. J.

(*b*) *Smith v. Kendal*, 6 T. R. 123.

(*c*) — *v. Ormston*, 10 Mod. 186; *Moore v. Paine*, Hardw. Cas. 288; *Frederick v. Cotton*, 2 Show. 8; *Fisher v. Pomfret*, 12 Mod. 125, Carthew, 403; *Smith v. Maclure*, 5 East, 476.

(*d*) *Scott v. Laing*, 19 March 1707, Morr. 1535; *Swinton v. Thom's Representatives*, 26 Jan. 1709, Morr. 1536; *Ker v. Brown*, 22 July 1715, Morr. 1539; *Macdowal v. Duke of Douglas*, June 1731, Morr. 1541; Forbes on Bills, 49, and two cases (*Mickieson v. Graham*, and *Fairbairn v. Goodsir*) therein cited. The same thing was held with regard to indorsation in the case of *Auchinleck v. Millar*, 15 Feb.

1715, Morr. 1537, where an indorsation without the words "value received," was preferred to a back-bond granted by the drawer and payee to the acceptor.

(*e*) Vide argument in Shower, 482; *Macleod v. Snee*, 2 Lord Raym. 1545; per Lord Ellenborough, in *Grant v. Da Costa*, 3 M. and S. 351; *White v. Ledwich*, cited in a note to Bayley, 40.

(*f*) Vide 9 & 10 W. III. c. 17, as amended by 3 & 4 Anne, c. 9, §§ 4, 5, 6.

(*g*) *Clayton v. Gosling*, 5 B. and Cr. 362; 8 D. and R. 110.

(*h*) *Grant v. Da Costa*, note *e*, *supra*.

(*i*) *Highmore v. Primrose*, 5 M. and S. 65.

In Scotland, where the insertion of these words is not necessary, the holder of a bill or note, whether he is payee or indorsee, is generally presumed to have given value, unless the contrary is proved by his writ or oath; and this will be held whether the words "value received" have been inserted or not (*a*).

This presumption, that the acceptor has got value, applies, though the bill should contain a false description of the particular value. For instance, in accommodation bills, which generally bear to be drawn for value, although value is seldom got till they are discounted, this value will be presumed to have gone to the acceptor's use (*b*). 'Although it was decided in an old case (*c*) that a bill granted on death-bed did not prove its onerous cause, it is questionable whether such a rule would now be followed.

Value in
account.

(15.) 'Value in account.'

'In the former edition of this work it was laid down (on the authority chiefly of one old case (*d*), now considered to have been decided as a case of accounting between factor and principal), that the words "value in account" were to be construed differently from value received, and as applying to value in the hands of the payee, whether the payee was the drawer himself or a third party. It is now settled that the words "value in account" apply, like value received, to value in the hands of the acceptor, and that he cannot plead against an indorsee that the value was inadequate (*e*).'

3. Consideration.

These principles will enable us now to examine a question which has been much discussed in the English courts, viz., how far the value implied in a bill or note affords the holder a good answer to

Consideration.

(*a*) *Scott v. Laing*, 19 March 1707, Morr. 1535; *Jaffray v. Robertson*, 2 Jan. 1712, Morr. 12337; *Swinton v. Thom's Representatives*, 26 Jan. 1709, Morr. 1536; *Ker v. Brown*, 22 July 1715, Morr. 1539; *Haliburton and Ker v. Lord March*, 16 Feb. 1725, 5 Br. Suppl. 156.

(*b*) *Wallaces v. Barrie*, 1793, M. 1484. The same doctrine was also held by the majority of the Court, as between the drawer and acceptor of an

accommodation bill, the case of *Berry v. Murdoch*, 15 Feb. 1822, Shaw's Rep. 328, Sess. Pap. in my possession. The report, by mistake, calls the document a promissory-note.

(*c*) *Christiesons v. Ker*, Feb. 1734, 2 F. D. 254, M. 12599.

(*d*) *Forbes v. Fonnerau*, 1741, M. 1472.

(*e*) *Wilson v. Loder*, 1 Feb. 1848, 10 D. 560; *Chiene v. Western Bank*, 20 July 1848, 10 D. 1523.

the plea of want of consideration, when urged in defence against payment of it.

In the law of Scotland it appears to be settled, with reference General Rules. to this question, 1st, That the presumption of value received, when pleaded by the holder of a bill (whether he is drawer, payee, or indorsee), cannot 'in general' be redargued, excepting by his writ or oath; 2dly, That there is no exception to this rule, unless either where there is some vice which affects the essence of the contract, as where the drawee of a bill has been forced to accept it, which may be proved by parole evidence, or where there has been fraud in the transaction, which may likewise, in certain cases, be thus proved; and, 3dly, That although the first of these objections (under the limitations to be afterwards explained) vitiates a bill or note in whatever hands it is, the objection of fraud cannot affect the claim of any but a party privy to it, or be pleaded against a holder of the bill or note 'to any further extent than that of making him prove that he gave value' (a), unless it be proved by his own writ or oath that he is privy to the fraud, or holds the document merely for behoof of some party who is privy to it. 'It is well established, both in England and in Scotland, that a defence of no consideration is not valid, unless it set forth that neither the holder nor any of the previous parties gave value (b).'

The foundation of these rules of Scotch law is, that writing cannot be taken away except by writing, or by the oath of party, which is admitted as the best kind of proof. There is no exception, unless the person claiming as holder of the bill or note be charged with fraud. When parole proof of defence admitted.

In the *first* place, when an allegation of fraud is not contradicted *ex facie* of the bill, parole proof of it will be allowed against any party privy to it, 'to the full effect of destroying his right to recover,' but not 'now' against an indorsee or holder, 'to any other effect than that of making him prove that he gave value,' unless he is also alleged to be privy to it. Where a bill alleged to have been lost or stolen was discounted by an unknown party with a respectable bank, who having thereafter claimed as indorsees against the drawer, the Court ('acting on the law as it then existed') required no proof from them that they were onerous or *bona fide* holders; but, in respect of their *avermment* Rule where fraud not inconsistent with terms of bill.

(a) 19 & 20 Vict. c. 60, § 15.

19 L. J. (Ex.) 8; *Kidston v. Stead*, 21

(b) *Hunter v. Wilson*, 20 Nov. 1849, Jan. 1809, F. C.

to that effect, and that the other party had offered no proof to the contrary, or to show that the claimants knew of the bill being previously lost or stolen, sustained their claim (a). It was here implied, that parole proof of fraud against the holders of the bill would have been competent; but as none was offered, the indorsation was held sufficient, without proof of their onerosity and *bona fides*. A similar decision was given on the same grounds in a subsequent case (b). 'According to the law as long established in England, and as now established in Scotland by the Mercantile Amendment Act, the holder is bound, as soon as it is proved that the bill he holds has been lost, stolen, or fraudulently obtained, to show that he gave value for it (c).'

Rule where
fraud incon-
sistent with
terms of bill.

2dly, When any charge of fraud against a payee or indorsee, with reference to the condition on which he holds or enforces payment, is contradicted *ex facie* of the document, as when he is alleged to have got it under a condition which he has not fulfilled, although he appear *ex facie* to hold it absolutely, or to have got it in collusion with another person, to assist his fraudulent schemes, though the bill or note bear that he is an onerous holder, no proof is admitted except his writ or oath. For, after a person has either subscribed a bill or note in favour of a certain payee, or indorsed it, or put it subscribed by him into the hands of a third party, whom he thus empowers to transfer it, he cannot be allowed to plead against the holder that his right is not onerous; in other words, that it is different from what it appears to be *ex facie* of the bill or note, unless he proves his allegation by evidence as good as that of the bill or note, viz., by the holder's writ or oath. Thus (d), one acceptor of a bill having alleged that the indorsees who charged him for payment had retired the bill in collusion with a co-acceptor, in order that full payment might be exacted from the suspender, the Court decided that such an allegation could not be proved unless

(a) *Lambton and Co. v. Marshall*, 21 June 1799, Morr. App. to Bill, No. 8.

(b) *Scott and Co. v. The Kilmaronock Banking Company*, 27 Feb. 1812, F.C., where the Court decided in favour of bankers who had discounted to a stranger a bill alleged to have been lost or

stolen, after a report of bankers that they had exercised sufficient diligence. But the facts on which this report proceeded appear to have been taken on the statements of the party.

(c) 19 & 20 Vict. c. 60, § 15.

(d) *Wright v. Ritchie*, 24 June 1809, F. C.

by the indorsee's writ or oath. Again (a), in a charge by indorsees, on a bill which had been granted as a fraudulent preference to certain of the acceptor's creditors, the Court refused to admit the averment that the indorsees knew this fact when they took the bill, in respect it was not offered to be proved by their writ or oath; it being held, that "such allegations, as they were directed only against the *bona fides* and onerosity of the indorsation," could not be proved otherwise. Afterwards (b) a similar decision was given with regard to the allegation, that a bank, the indorsee of certain bills, had applied them to a different purpose from that for which they had been granted. In another case (c), of a charge by the indorsee against the granter of two promissory-notes, although it was proved that the notes had been granted while the granter was bankrupt, for securing an illegal preference to a particular creditor, and though there was strong reason to suspect that the holder had taken an indorsation to them collusively, in order to make good that preference, the Court refused to allow any proof on that subject, but his writ or oath. The principle of decision appears to have been the same in many later cases (d).

In one case (e), the Court passed a bill of suspension, on an offer of parole evidence by the acceptor of a bill to prove, 1st, That his acceptance had been obtained by fraud; and 2dly, That the bill, having been accepted blank in the drawer's name, the chargers had,

Exceptions to
the preceding
rule.

(a) *Craig v. Shiells and Co.*, 15 Dec. 1809, F. C.; see also *Glen v. National Bank*, 14 Dec. 1849, 12 D. 353; *Strathcarr v. Masterman*, 25 June 1850, 12 D. 1087.

(b) *John Scott*, Petitioner, 19 Dec. 1809, F. C.

(c) *Arrol v. Marshall*, 14 Jan. 1821, F. C.

(d) *Macintosh v. Macleod*, 7 July 1821, 1 Shaw, 108; *Denniston and Co. v. Thomson*, 2 Feb. 1822, *ibid.* 289; *Moaro v. The Renfrewshire Banking Co.*, and *Turner v. Ditto*, 8 Feb. 1822, *ibid.* 305-6, where an offer to prove non-onerosity, even by the charger's books, was rejected, in respect that it was too vague. *Vide also Hay v. Horn*, 1 Dec. 1823, 2 S. and D. 546; *Bell v.*

Geikie, 2 Dec. 1823, *ibid.* 546; *Mitchell v. Cairncross*, 6 March 1824, *ib.* 774; *Nasmith*, 24 June 1824, 3 S. and D. 166; *Donaldson v. M'Donnel*, 15 June 1825, 4 S. and D. 87; *Dunlop v. Reid*, 13 June 1827, 5 S. and D. 796; *Peat v. Wilson*, 8 Dec. 1827, 6 S. and D. 225; *Wilson*, 18 Dec. 1827, 6 S. and D. 259; *Bennett v. Burgess*, 27 May 1828, 6 S. and D. 854; *Adam v. Boyd*, 12 June 1830, 8 S. and D. 914; *Winton*, 1 June 1831, 9 S. and D. 662; *Jameson*, 23 Nov. 1832, 11 S. and D. 80; *Haig*, 29 Nov. 1832, 11 S. and D. 145; *vide also Campbell*, 21 Jan. 1832, 10 S. and D. 229; *Sandeman and Miller v. Thomson*, 12 Nov. 1831, 10 S. and D. 4.

(e) *Andrew v. Buick and Co.*, 21 June 1821, 1 Shaw, 78.

in collusion with the persons who obtained the acceptance, filled in their names as drawers, without paying any value. But, besides that the case was not finally decided, it might be held that the alleged fraud in it affected the constitution of the holder's right, since his name was not inserted by the acceptor, but was said to have been fraudulently inserted by him, in a blank left for the purpose at the time of acceptance, in furtherance of the fraudulent scheme to which he was alleged to have been a party. The case cannot, therefore, be held to weaken the authority of the general rule. Nor is that rule contradicted by a case (*a*), where the Court, after allowing inspection of the books of the holder of a bill, first admitted a proof at large, and finally reduced the bill, as granted without value, on account of the suspicious nature of the books, and the want of a satisfactory explanation regarding them. The rule applicable to that case appears to have been, that every merchant's books must be regular, and all entries in them be fully explained, otherwise he is to be held *pro confesso* as if he had refused to produce them, or at least other evidence may be admitted against him. In another case (*b*), the holder of a bill blank indorsed having brought an action against the acceptors, a proof at large was allowed of an allegation of fraud by the original payee, to which he was said to be privy. But the circumstances of the case, more especially his own statement as to his mode of acquiring it, and a delay of five years after the term of payment in bringing his action, were held, independently of all other evidence, to create a presumption against his onerosity and *bona fides*. In another case (*c*), where there was as great delay in bringing the action, but where the indorsee's account of his mode of acquiring the bill was exposed to no suspicion, it was found, that his right could not be redargued except by his writ or oath. A different rule, indeed, appears to have been adopted in one earlier case (*d*), where, in an action by the indorsee against the acceptor of a bill, the Court allowed to the latter parole proof of an allegation, that the indorsement was a contrivance between the drawer of a bill and the holder, to evade certain

(*a*) *Pentland and Son v. Bell and Co.*,
23 Jan. 1822, 1 S. 426.

(*b*) *Thomson v. Maclauchlans*, 8 Nov.
1823, 2 S. 497; Session Papers.

(*c*) *Ferrie v. Mathie*, 24 June 1824,
3 S. 174.

(*d*) *Corrie v. Aitken and Others*, 27
July 1785, M. 1520.

defences which the acceptor had against the drawer. But this case, though frequently cited, has been since disregarded.

There are other cases, which are not very easily reconciled with the rule now stated. Thus, in one case (*a*), the indorser of a bill who had retired it, was, notwithstanding the plea of his being an onerous holder, found not entitled to recover its amount from the acceptor. But the pursuer was confessedly general agent of the drawers, for whose accommodation the bill had been granted; and there were various circumstances, some instructed by his writ, and others not denied, from which the Court held it to be proved that he had retired the bill for the drawer, who was the proper debtor. Even under these circumstances the case was decided by the narrowest majority, and the majority intimated that they proceeded on its special circumstances, as taking it out of the general rule. In a subsequent action by the same pursuer, on a bill indorsed to him by the same parties, under circumstances somewhat different, the Court, holding that there was no proof of his agency in this case, refused to allow his onerosity to be disproved except by his writ or oath (*b*).

It may be laid down, 3dly, That fraud in acquiring a bill or note may be proved by parole evidence against the payee, or even against an indorsee 'to make him prove that he gave value (*c*),' although the allegation should be contradicted *ex facie* of the document, by its bearing or implying to be given for value; for this is a case of *fraus dans causam contractui*, which vitiates the consent on which the holder's right is founded; and the reasons that exist against subjecting a *bona fide* indorsee to such an inquiry are not applicable here, as the document is in the hands of the party said to have been guilty of the fraud. This was held in a case (*d*), where the Court were of opinion, that a charge of fraud by the acceptor against the drawer of a bill, in obtaining his signature, would have formed a relevant subject of proof, though the statement made was not considered specific enough to afford ground for his judicial examination.

Rule where fraud in obtaining the bill.

There are three other cases, which appear, at first, to go farther

(*a*) *Campbell v. Dryden*, 25 Nov. 1824, 3 S. 320.

(*b*) *Campbell v. Smith*, 12 June 1827, 5 S. 794.

(*c*) 19 & 20 Vict. c. 60, § 15.

(*d*) *Goodfellow v. Madder*, 27 July 1785, Morr. 1483.

than the rule last laid down, but which are not truly inconsistent with it. In the first case (*a*), a person who was said to have got an accepted bill only in security for the delivery of some victual, to be given back on delivery of the victual, and who was accordingly decreed by an inferior court to give it up, on a parole proof of these facts, having notwithstanding suspended the decree, and put ultimate diligence in force on the bill, the Court confirmed the decree of restitution, and found him liable for oppression and damages. But he had not objected to parole proof at first, nor did he deny the facts stated, so that they might be held as proved by his admission, which was equal to his oath. In the second case (*b*), it was found that the payee of a bill could not, on its non-acceptance, enforce payment against the drawer, in the face of a liquid claim of compensation against him by the drawer, which was instantly instructed, and which arose out of the same transaction on account of which the bill had been drawn. But this decision proceeded on the separate ground of compensation *de liquido in liquidum*. In the third case (*c*), where the holder of a bill had presented it to a bank for discount, and it had not been discounted, but the bank retained it and brought an action on it against the acceptor, they were allowed, before answer, to prove, by parole evidence, that the holder had allowed them to retain it in security of a prior debt. Here, the bank had the *prima facie* title to the bill, and their averment of the condition on which they had been allowed to retain it was truly a limitation of their right *ex facie* of it, and, by offering such proof, they abandoned the presumption arising in their favour *ex facie* of the bill. The proof failed (*d*).

Remarks on
preceding
rules.

These three rules seem to contain the essence of what has been decided in Scotland upon the effect of "value received," as implied or expressed in a bill or note in regard to the charge of fraud. 'Perhaps they state the law in a more defined form than it permits. The tendency has been of late to relax the stringency of the rule against the admission of parole, and to allow such proof in the case of every distinct charge of fraud. The modern cases show that evidence raising a suspicion of fraud prevents the application of the

(*a*) *Robertson v. Ogilvie*, 6 March 1755, M. 1527.

(*b*) *Arthur v. Oldcorn*, 29 Jan. 1717, M. 1482.

(*c*) *Borthwick v. Bremner*, 13 June 1833, 11 S. 716.

(*d*) *Id. v. eund.*, 22 Nov. 1833, 12 S. 121.

rule, and lets in circumstantial evidence to prove the want of *bona fide* consideration (a). Thus proof has been allowed *prout de jure* to show that the holder of an accommodation bill had, when acting as the drawer's agent, fraudulently failed to obtain heritable security for the amount from the acceptor (b); and where the party holding the bill is alleged to be trustee for the person who committed the fraud, parole proof of the trust has been admitted (c).

'If the circumstances alleged against the holder are not sufficient at once to let in parole proof, they may be sufficient to entitle the Court to call on him to explain in a condescendence how he came by the bill (d), or to appoint his judicial examination (e). If the explanation he gives makes it clear that he has given no value, farther inquiry is of course unnecessary (f). If it leaves strong suspicion of fraud, parole evidence may then be permitted (g); but if it be satisfactory, there is an end of the matter (h). To justify calling on the holder to any extent, there must be a specific statement against him (i); and alternative statements, such as that he either gave no value or got the bill by fraud, are irrelevant (k). Even though he should at first escape the ordeal of explanation or parole proof, he may still have to submit to investigation, if the oath he emits on reference should be unsatisfactory (l). Until the question as to the admissibility of parole proof is decided, proof before answer should not in general be allowed (m).'

(a) *Per* Lord Wynford, in *Hunter v. George's Trustees*, 13 May 1834, 7 W. and S. 333; *Little v. Smith*, 9 Dec. 1845, 8 D. 265; *Anderson v. Lorimer*, 21 Nov. 1857, 20 D. 74; *York v. Gossman*, 5 July 1861, 23 D. 1245.

(b) *M'Alister v. Gemmel*, 23 Feb. 1863, 4 M'Q. Ap. 449.

(c) *Middleton v. Rutherglen*, 8 Feb. 1861, 23 D. 526.

(d) *Wilson v. Pollock, Gilmour, and Co.*, 13 Nov. 1827, 6 S. 7; *Little v. Smith*, 9 Dec. 1845, 8 D. 265. But see the Lord Justice-Clerk's opinion in *Newlands v. Brock*, 11 Nov. 1863.

(e) *Fell v. Lyon*, 16 Feb. 1830, 8 S. 543; *Campbell v. Turner*, 24 Jan. 1822, 1 S. 266; *Cairncross*, 6 March 1824, 2 S. 774.

(f) *Smith v. Stark*, 16 Dec. 1831, 10 S. 150; *Beveridge v. Henderson*, 25 Nov. 1841, 4 D. 87; *Friar v. Kerr*, 8 Feb. 1853, 2 Stuart, 209.

(g) *Burns v. Burns*, 20 July 1841, 3 D. 1273.

(h) *Campbell v. Turner, Cairncross, ut supra*.

(i) *Campbell v. Hill*, 29 Nov. 1826, 5 S. 54; *Dunlops v. Reid*, 13 June 1827, 5 S. 796; *Little v. Smith*, 24 Jan. 1845, 17 S. J. 148.

(k) *Mackenzie v. Hall*, 21 Feb. 1855, 17 D. 460; *Barrie v. Tait*, 28 Nov. 1843, 6 D. 102.

(l) *M'Lean v. Smith*, 16 June 1855, 17 D. 950.

(m) *Paterson v. Baxter*, 13 Nov. 1856, 19 D. 37.

Bills obtained
by violence.

With regard to bills or notes granted under the dread of personal violence, it would appear from one case (*a*), that the law of England supports an action on such a bill or note against the granter at the instance of an indorsee, provided the indorsee proves that he gave an onerous consideration for it. In Scotland, force used to obtain the subscription of a bill or note nullifies that subscription, since the subscriber's consent is wanting. The party is not bound by such a subscription more than if it had been forged; and, as an obligation originally null cannot become valid by transmission, even an onerous indorsee cannot have a better claim under a bill or note thus subscribed than the original payee (*b*).

Bills obtained
partly by
violence and
partly by fraud.

This principle does not seem applicable, when the party subscribing voluntarily interposed his consent, although it should have been impetrated from him under circumstances which raise a good objection against the original payee: for instance, where it has been obtained by fraud, or by a mixture of deception and terror, though without such a degree of violence as would influence a man of ordinary constancy. In a case of this kind (*c*), where a party, whose cattle had broken into a field, was intimidated, by the threat of a law-suit, to grant a bill to the owner for an unreasonable sum of damages, the Court decided that the bill must be reduced in so far as the damages were exorbitant. In a later case (*d*), where a promissory-note had been impetrated from a man of weak mind, for damages on account of criminal intercourse with the payee's wife, which had taken place by collusion betwixt the wife and husband, to extort money, the Court reduced the note. But it does not appear that the grounds of reduction in either of these cases could have been pleaded against an indorsee suing on the bill or note; for in both cases there was a real consent, and consequently an obligation, which, till reduced, was transmissible to a third party. It

(*a*) *Duncan v. Scott*, 1 Campb. 100, where, in an action by the indorsee against the drawer of a bill, who had granted it while in prison, and in consequence of a threat that he would otherwise be put to death and his effects confiscated, Lord Ellenborough held, that, as the drawer was not a free agent at the time of granting the bill, the plaintiff must prove that he

had given a consideration for it; and, as he failed to do so, he was nonsuited.

(*b*) *Willocks v. Callendar*, 26 Nov. 1776, M. 1519; and *Wightman v. Graham*, 16 Dec. 1787, M. 1521.

(*c*) *Forman v. Sheriff*, 24 May 1791, M. 16515.

(*d*) *M'Ilwham v. Ker*, 22 Feb. 1823, 1 S. 240.

was not as in the case of force, where there is no consent. On the contrary, the granter had, by his own act, given currency to the obligation; and his objections against it, being personal to the original payee, could not be urged against an indorsee who was not privy to them.

It was perhaps on such grounds that the Court (*a*) refused to sustain as a defence by the acceptor of a bill against an onerous indorsee, that the drawer had induced the acceptor to sign it when he was intoxicated. Such a bill would probably have been reduced in a question with the drawer himself (*b*). 'In England it has been held that the drawer cannot recover (*c*). In the case of an indorsee, it would formerly have been presumed that he held onerously, and in *bona fide*, till the contrary was shown by his writ or oath; but under the Mercantile Amendment Act (the bill having been fraudulently obtained), it will now be necessary for him to prove that he gave value (*d*). Such pleas have been held to be refuted by partial unconstrained payments to account (*e*).'

Bills signed by
intoxicated
persons.

'In England, those defences on the ground of want of consideration, which in Scotland are proveable only by writ or oath, may be proved by parole (*f*). The *onus probandi*, as in Scotland, rests on the defender (*g*). The only case in which the defender is limited in his proof to something analogous to our proof by writ or oath, is where he wishes to alter or vary the terms of the bill (*h*); as, for example, if he should aver that a bill payable on demand was not to be payable until a certain time (*i*), or that a bill *ex facie* payable absolutely, was to be payable only if the holder fulfilled a certain condition (*k*). The law of England and Scotland is the same as to

Law of Eng-
land as to mode
of proving
want of consi-
deration.

(*a*) *Wilson and Fraser v. Nisbet*, 24 Feb. 1736, M. 1509. Vide also in England, *Norham v. Latouche*, 4 Carr and Pay. 140, where it was held to be no objection to an action on a bill by an onerous indorsee, that the acceptor was intoxicated when he signed it, unless the indorsee had known the fact.

(*b*) *Jardine v. Elliot*, 9 June 1803, H. 684; *Duncan*, 18 July 1839, Macfarlane's Jury Reports, 278.

(*c*) *Gore v. Gibson*, 13 M. and W. 623; 14 L. J. (Ex.) 151.

(*d*) 19 & 20 Vict. c. 60, § 15.

(*e*) *Thomson v. Annandale*, 23 Jan. 1829, 7 S. 305.

(*f*) *Abbots v. Hendrick*, 23 Nov. 1840, 2 Scott, N. R. 183; *Jeffries v. Austin*, 1 Str. 674.

(*g*) *Collins v. Martin*, 1 Bos. and Pul. 651; *Fitch v. Jones*, 24 L. J. (Q. B.) 295.

(*h*) *Ridout v. Bristow*, 1 Tyr. 84.

(*i*) *Moseley v. Hanford*, 10 B. and C. 729.

(*k*) *Free v. Hawkins*, 8 Taunt. 92.

the kind of proof admissible, when fraud in obtaining (*a*), or illegal consideration in granting (*b*), is averred. In both parole proof is admissible. And where proof that the holder gave value is an answer, that proof may also be by parole (*c*).'

What is want
of considera-
tion.

The facts which would be relevant in England, if proved by parole evidence, would have equal weight in Scotland if proved by the writ or oath of the payee or indorsee. It will be sufficient, for instance, to prove against either of them, that they obtained the bill or note wholly or in part without consideration, or that they obtained it fraudulently, or that they are now applying it to a different purpose from that for which it was given to them.

Partial failure.

In England, it has been held, that, when the consideration for the bill or note is a contract, which has not entirely failed, but there is merely such a partial failure of it as resolves into an unliquidated claim of damages, as, when bills have been accepted in consideration of the payee giving the acceptor the lease of a house, and he has let him into possession, but given him no lease (*d*); or for the price of some goods which are alleged to have turned out unmarketable (*e*); or for a pipe of wine (*f*), or of other articles (*g*), which turn out bad; or where a note has been taken for apprentice-fee by way of indulgence (the money being payable at the beginning of the apprenticeship), but the apprenticeship is broken off by the master's fault before its termination (*h*); or when a note has been granted for apprentice-fee, and the apprentice leaves his service on account of the indenture not being properly stamped, while it was still in his master's power or his own to get it properly stamped (*i*); or where a note has been granted for the price of a new invention, which turns out to be an improvement, though not to the extent represented by the plaintiff (*k*); 'or when a bill is granted for work to be done, and the work, when ended, is bungled in part

(*a*) *Wright v. Crookes*, 1 Scott, N. R. 685.

(*b*) *Jeffreys v. Austin*, 1 Strange, 673; *Collins v. Blanten*, 2 Wils. 347.

(*c*) *Harvey v. Towers*, 6 Exch. 656, 20 L. J. (Ex.) 318.

(*d*) *Moggridge v. Jones*, 14 East, 485; 3 Camp. 38.

(*e*) *Morgan v. Richardson*, 1 Camp.

40; also *Obbard v. Betham*, 1 M. and Malk. 483.

(*f*) *Fleming v. Simpson*, 1 Camp. 40, note.

(*g*) *Tye v. Gwynn*, 2 Camp. 346.

(*h*) *Grant v. Welchman*, 16 East, 207.

(*i*) *Mann v. Lent*, 10 B. and Cr. 877.

(*k*) *Day v. Nix*, 9 Moore, 159.

and not worth the amount in the bill (*a*);' there is merely a counter claim for damages, but no defence against payment of the bill or note. When a bill has been granted in part of the price of goods sold, it is no defence against payment, that, after they were for two months in the hands of the vendee's agent, the vendor has again forcibly taken possession of them; it being held that the contract was complete delivery, and that the remedy was by trespass against the vendor, as against any third party. Besides, the vendee had the use of the goods in the meantime, so that, in any view, the consideration had not entirely failed (*b*). It has been decided (*c*) that, when a note was granted, payable at a certain day, as part of the consideration for the payee executing a conveyance of an estate, the rest of the consideration being a sum payable at a future day, it is no defence against payment of the note, that the conveyance had not yet been executed or offered. It was held that the note was an absolute obligation, separate from the bargain, as to which, taken *per se*, the price and conveyance would have been concurrent acts. 'There is one instance in England of a partial failure of a contract which justifies limiting decree to the amount due, viz., where a bill has been granted for payment of law accounts untaxed, in which case decree is given only for the balance after taxation (*d*).'

On the other hand, if the contract is rescinded, the consideration of the bill or note fails, and payment of it cannot be enforced (*e*). 'Entire failure of the promised consideration always justifies refusal to pay to the party failing (*f*). Thus, if a price is to be paid for a bill, and the price is not paid, the party failing to pay cannot recover (*g*). Or, if a bill be granted under an entire mistake as to the consideration, as under the idea that a previous bill, of which it

(*a*) *Trickey v. Larne*, 3 Feb. 1840, 9 L. J. (Ex.) 141.

(*b*) *Stephens v. Wilkinson*, 2 B. and Ad. 320.

(*c*) *Spiller v. Westlake*, 2 B. and Ad. 155. As to implement of the bargain which formed the consideration, reference is made also to *Evans v. Morgan*, 2 Tyrwh. 396, and 2 Cr. and Jerv. 453.

(*d*) *Sayers v. Wagstaffe*, 4 Dec. 1844, 14 L. J. (Ch.) 116. See also

Stewart v. Lang, 15 Jan. 1861, 23 D. 286, where opinion given, that diligence should not in general be suspended while the accounts are being taxed.

(*e*) Chitty, 49.

(*f*) *Abbot v. Hendricks*, 23 Dec. 1840, 10 L. J. (C. P.) 51; *Jolly v. Hinds*, 30 Jan. 1834, 3 L. J. (Ex.) 151.

(*g*) *Astley v. Johnston*, 23 Jan. 1860, 29 L. J. (Ex.) 161.

was a renewal, was valid (*a*), which was invalid, or that some sum was due which was not due (*b*), the drawer and cognisant indorsees cannot recover.' It was held (*c*) to be a good defence against payment of a banker's check, given for the price of a horse, that the horse had been returned as unsound, and that (although the plaintiff had at first refused to receive him back) the horse had been at last put into his stables without his knowledge; it being held that the plaintiff knew of the unsoundness, and was therefore barred, by his own fraud, from pleading that the contract had not been rescinded (*d*).

The principle of the distinction 'taken in England between the cases of partial and total failure' seems to be (*e*), that, though the contract may be divided, if part of the consideration fails, this is not the case with any security, such as a bill or note, granted in implement of the contract, which, being indivisible, must remain entire, unless the consideration has entirely failed. Such a distinction may be necessary in England, in order to restrain the latitude of parole proof, which would otherwise, in this case, be admitted in defence against a liquid written obligation. But, in Scotland, where the presumption of value arising on the face of the bill or note cannot be redargued unless by the holder's writ or oath, there appears to be no danger in giving full effect to such evidence against himself, in the way of direct defence against payment, whether he admits that the contract has failed entirely, or that there is merely such a partial failure in implement of it as forms a ground of abatement from the amount of the bill or note.

What is sufficient consideration.

It seems to be a sufficient answer to the plea of want of consideration, whether instructed, as in England, by parole evidence, or established, as in Scotland, by the holder's writ or oath, that it was granted 'as a return for professional services (*f*); or in security for

(*a*) *Bell v. Gardiner*, 21 April 1842, 11 L. J. (C. P.) 195; *Mather v. Maidstone*, 24 Nov. 1856, 26 L. J. (C. P.) 58.

(*b*) *Forman v. Wright*, 13 May 1851, 20 L. J. (C. P.) 145.

(*c*) In *Lewis v. Cosgrave*, 2 Taunt. 2.

(*d*) Vide *Solomon v. Turner*, 1 Stark. 51, and *Tye v. Gwynn*, 2 Camp. 346, where it was held that the proof of

fraud would have annulled the contract altogether, and thus afforded a complete defence against payment of the note. Also, *Poulton v. Lathmore*, 4 M. and R. 208; *Archer v. Bamford*, 3 Stark. 175, and Chitty, 89, note *d*.

(*e*) Per Lord Ellenborough, in *Tye v. Gwynn*, 2 Camp. 347.

(*f*) *Young v. Sheridan*, 24 Feb. 1837; 15 S. 664.

past or future advances (*a*); or for goods consigned for sale, though not sold at the maturity of the bill (*b*);' or in implement of an obligation in honour (*c*), or in morality (*d*); or of a natural obligation, as to provide for a child (*e*); or of a debt due by a third person (*f*); or in consideration of forbearance to his representative (*g*); 'or of compromising a law-suit (*h*); or of retiring a bill on which the acceptor was cautioner (*i*);' or of paying a debt barred by prescription (*k*), or by a discharge or certificate (*l*); but not that it was granted from affection to a child, or gratitude to his father, or from an intention to evade the legacy duty, it being held, in this last case, that it would be a donation *mortis causa*, which cannot be constituted by bill (*m*). 'In England, it has been held, that a bill granted in advance for services to be performed, but which the drawer is under no binding obligation to perform, is without consideration even after the services are actually rendered on the faith of it (*n*). It is not probable that this decision will be followed elsewhere.'

Although the want of consideration for a bill or note cannot, for the reasons already stated, be proved, according to the law of Scotland, unless by the holder's writ or oath, any sort of proof is competent to establish, as a ground for refusing action on such documents, that the consideration given, either for the granting or indorsation of them, was illegal. For the concealment of illegality under the disguise of an onerous deed is part of the scheme devised by both parties to defeat the law; and this cannot be counteracted,

Illegal
consideration.

(*a*) *British Linen Co. v. Thomson*, 25 Jan. 1853, 15 D. 314; *Stewart v. Wylie*, 9 June 1849, 11 D. 1123; *Glen v. National Bank*, 14 Dec. 1849, 12 D. 353.

(*b*) *Gibson v. Rutherglen*, 18 July 1842, 1 Bell's App. 519.

(*c*) *Per* Sir J. Mansfield, C. J., in *Gibbs v. Merrhill*, 3 Taunt. 307. See next note.

(*d*) *Lee v. Muggridge*, 5 Taunt. 36. This has since been doubted: see *Wen-
nal v. Adney*, 3 Bos. and Pull. 247; and *Eastwood v. Kenyon*, 11 Ad. and E. 438.

(*e*) *Seton v. Seton*, 2 Brown, Ch. Cas. 616.

(*f*) *Popplewell v. Wilson*, 1 Str. 263.

(*g*) *Ridout v. Bristow*, 1 Tyrrwh. 84, 1 Cr. and J. 231.

(*h*) *Cook v. Wright*, 9 July 1861, 30 L. J. (Q. B.) 321; *Balfour v. Sea, Fire, and Life Insurance Co.*, 7 Dec. 1857, 27 L. J. (C. P.) 17.

(*i*) *Boyd v. Fraser*, 28 Jan. 1853.

(*k*) *Per* Lord Mansfield, 1 Cowper, 290; Lord Raym. 389.

(*l*) *Ibidem*. Vide also *Trueman v. Fenton*, 2 Cowp. 544; *Birch v. Sharland*, 1 T. R. 715; *Brix v. Braham*, 8 Moore, 261; *Eastwood v. Kenyon*, *supra*; *Hawkes v. Saunders*, Cowp. 289, 290.

(*m*) *Holliday v. Atkinson*, 5 B. and Cr. 502. See *supra*, p. 19.

(*n*) *Hulse v. Hulse*, 18 Jan. 1856, 25 L. J. (C. P.) 177.

without endeavouring to get at the truth of the transaction by any competent evidence (*a*). This rule, however, will in general affect only those who were parties to the illegal consideration for which the bill or note was granted. The principle in such cases, which is, that courts of law must not give effect to rights founded on a transgression of the law, applies to the transgressors, who are precluded from suing upon the bill or note. But the bill or note is not altogether invalid; for, as it is a negotiable document, indorsees, unless proved to have been parties to the illegal cause of granting it, cannot be affected by such objections. The original payee is liable to them by his indorsation, and the acceptor, in consequence of his signing a document capable of transmission to a third party. There are exceptions to this rule, which shall be afterwards noticed; but they are founded on special statute. ‘As a bill granted for an illegal consideration would be a bill fraudulently obtained, in the eye of the law, the holder of it would now have to show (under the Mercantile Amendment Act) that he gave value for it (*b*).’

*Mala in se, or
mala prohibita.*

Under these limitations, it may be laid down, that no party can enforce payment of a bill or note granted or indorsed to him for a consideration, either criminal in itself, or prohibited by law. In this view, it may be doubted whether there is solid ground for the distinction laid down by some authorities (*c*), between *mala in se* and *mala prohibita*, to the effect of holding that the latter do not nullify a contract, unless nullity is the penalty inflicted by statute, but merely give a claim for the statutory penalty. This distinction has been denied (*d*), and apparently with reason; for, whatever the law prohibits, must be considered as a transgression, with reference to those who are subject to it; and, therefore, courts of law should refuse action upon contracts founded on a violation of express laws, as much as on those which are criminal in themselves. The application of this doctrine shall be afterwards considered.

What are
illegal con-
siderations.

There are various contracts for which action is refused at common law, on one or other of the grounds now stated, whether the

(*a*) *Vide* opinion of Wilmot, C. J., in *Collins v. Blantern*, 2 Wilson, 350.

(*b*) 19 & 20 Vict. c. 60, § 15.

(*c*) Blackstone, i. 57; *Witham v. Lee*, 4 Esp. 264.

(*d*) *Per* Heath and Rooke, J., in *Aubert v. Maze*, 2 Bos. and Pull. 374–5. See also, *per* Pollock, in *Attorney-General v. Radloff*, 14 June 1854, 23 L. J. (Ex.) 240.

action be brought on bills or notes, or on any other obligation.

1. No obligation is good, when granted as an incentive to commit a crime. The rule of law is, "You shall not stipulate for iniquity" (*a*). The same rule strikes against any obligation granted as an incentive to a breach of morality, as a bill granted for the price of prostitution (*b*). But, on the other hand, it is sustained when granted as an indemnity for past cohabitation (*c*), or as a provision for the offspring of an illicit connection (*d*). It has been decided, however, that such a security is not valid, when granted to a prostitute (*e*), or on account of an adulterous connection (*f*), 'or to a

(*a*) *Per* Wilmot, C. J., in *Collins v. Blantern*, 2 Wils. 350. The same principle was recognised in the case of *Lord Lovat v. Fraser*, 8 Feb. 1745, M. 9557.

(*b*) In *Walker v. Parkins*, 2 Burr. 1568, judgment was given for the defendant, on demurrer, in an action upon a bond for an annuity of L.60, given by him to a woman who lived with him, to be vacated if she quitted him, or lived with another man, which the Court held to be a stipulation that she was to lose the annuity if she became virtuous.

(*c*) This has been held in England in these several cases : *ex parte Cottrel*, 2 Cowper, 242, being a bond by a person to pay a certain sum to another man, in consideration of his marrying a woman who had lived with the obligor ; in *M. Annandale v. Harris*, 2 P. Williams, 433, being the case of a bond of provision by a nobleman to a woman whom he had seduced, and to a child he had by her, but which had died before the action ; in *ex parte Mumford*, 15 Vesey, 289, where a claim in bankruptcy was sustained on three promissory-notes granted by the bankrupt to the petitioner for damages and expenses (for which an action had been raised), for seducing his daughter ; in *Turner v. Vaughan*, 2 Wilson, 339, being the case of an annuity of L.30 for life to a woman for past cohabitation ; in *Hill v. Spencer*, Ambler, 641,

where a bond of L.50 *per annum* to a prostitute for her future maintenance was sustained ; and in *Gibson v. Dickie*, 3 M. and S. 463, where effect was given to a bond for an annuity of L.30, granted in consequence of past cohabitation.

(*d*) In the case of *Annandale*, already cited, the bond was intended partly as a provision to the child. The bond, also, in *Cottrel ex parte*, was intended, in part, for the same purpose. In Scotland, in the case of *Irvine v. Skene*, 7 March 1707, Morr. 6351, the Court refused to sustain it as a ground of nullity against a bond, that it had been granted by a mother as a provision to her adulterous child ; and in the case of *Hamilton v. Bonamy and Hamilton*, 26 June 1765, Morr. 9471, they sustained a bond by a father under the same circumstances, so far as it was intended as a provision to the child begotten in the adultery.

(*e*) *Whally v. Norton*, 1 Vern. 483, where an opinion to this effect was expressed by the Master of the Rolls, and *Matthew v. Hanburgh and Ux*. 2 Vern. 187. *Vide* also 1 Bell's Comm. 299.

(*f*) In *Durham v. Blackwood*, 20 July 1622, Morr. 9469, the Court refused to sustain such a bond of aliment, even in so far as it was intended for the benefit of the issue. In *Ross v. Robertson*, 25 June 1642, the Court went to the other extreme, sustaining

husband to condone his wife's adultery.' Another instance of a bill annulled *ob turpem causam*, in a suspension between the original parties, occurs in a recent case (a). 2. A bond or other security affords no ground of action, when given in consideration of the grantee dropping a criminal prosecution (b), or procuring a pardon (c), or suppressing evidence (d). But such a bond or security has been sustained, when it is accepted by a party merely in satisfaction of his civil claims (though these should arise from the delict of another party) (e); or when authorized by the Court as part of the punishment (f); or when taken by an excise-officer in satisfaction of penalties which he holds a warrant to recover, pro-

a similar bond for the sole benefit of the mother. But, in the later case of *Hamilton v. Bonamy and Hamilton*, note d, they adopted what appears to be the proper distinction, sustaining such a bond so far as designed for the offspring, while they set it aside with regard to the adulterous mother. *Vide* also the English case of *Priest v. Parrot*, 2 Vesey, 160.

(a) *Hamilton v. Main*, 3 June 1823, 2 S. and D. 356.

(b) In *Wallace v. Hardacre*, 1 Camp. 45, action was sustained on a bill taken instead of a forged bill, solely on the ground of there having been no bargain to stifle a prosecution for the forgery. In *Collins v. Blantern*, 2 Wilson, 349, action was refused on a bond taken as a substitute for a promissory-note, which had been granted in consideration of the granter abandoning a prosecution for perjury. In *Kennedy v. Cameron*, 7 Feb. 1823, 2 S. and D. 192, the Court passed the suspension of a charge on a bill granted to induce a party to drop a prosecution for theft, even while the bill was in an indorsee's hands, the bill having been indorsed after the trial (in which the pannel had been acquitted), and the date of the indorsation being torn off.

(c) *Stewart v. The Earl of Galloway*, 3 June 1752, M. 9465; *Norman v. Cole*, 3 Esp. 253, *per* Lord Eldon, C. J.

(d) In *Pool v. Bonsfield*, 1 Camp. 55, Lord Ellenborough denied effect to an agreement by the payee of a bill to discharge it, on condition of his not being pressed in Court to answer the matters contained in an affidavit. In *Nerot v. Wallace*, 3 T. R. 17, the same decision was given against an agreement by the friend of a bankrupt to give a sum to his creditors, if they would desist from examining him with regard to certain funds.

(e) In *Harding v. Cooper*, 1 Stark. 467, effect was given to an agreement by the father of a bankrupt, who was prosecuted for fraud, to pay the prosecutor 2s. 6d. per pound, with his costs in the civil proceedings (after which the prosecution was dropped), the dropping of the prosecution not being proved to be part of the agreement.

(f) In *Beal v. Wingfield*, 11 East. 46, this appears to have been the ground of judgment. In *Kirk v. Strickwood*, 1 N. and Mann. 275, where a party convicted of a misdemeanour was advised by the Court to settle with the prosecutor, and in consequence paid L.20, and granted a note for about L.19, including the costs of prosecution, in respect whereof only a nominal sentence was passed upon him, action was sustained on the note. *Vide* report in 4 B. and Ad. 421.

vided his conduct is approved of by his superiors ; it being held, in such a case, that satisfaction has been given to all concerned (*a*). 3. In Scotland, the magistrates of a burgh, suing on the indorsation of a bill made to them by a debtor confined in their jail, for their indemnity in case of his making his escape, were found to have no good right ; it being held, that such a transaction was illegal, as tending to make magistrates negligent (*b*). 4. Effect has been refused in England to a promissory-note granted to parish officers by the father of a natural child, in consideration of being relieved from its maintenance ; this being held inconsistent with the English statutes, and with public policy (*c*). In a Scotch case (*d*), such an agreement was found ineffectual against a claim by the child, but the father's claim of relief against the kirk treasurer was reserved. 5. In England, where wagers are countenanced at common law, action is, however, refused on certain kinds of wagers (and of course on securities granted in implement of them), as being contrary to public policy (*e*), or to the feelings or interests of a third person (*f*), and for other causes. But our courts refuse effect to all wagers, on the sound principle, that courts of law were instituted solely for protection of real rights, and for the enforcement of serious contracts (*g*). Even in England, it has been held that a judge

(*a*) *Pilkington v. Green and Another*, 2 Bos. and Pull. 151 ; *Sugars v. Brinkworth*, 4 Camp. 46.

(*b*) *Shoolbred and Others v. Osborne*, 18 June 1769, Morr. 9468.

(*c*) *Cole v. Gower*, 6 East. 110.

(*d*) *Rankine*, 7 Dec. 1833, 12 S. and D. 183.

(*e*) *Vide Chitty*, 56, and cases therein cited. *Vide also Gilbert v. Sykes*, 16 East. 150, where action was refused upon a wager as to the life of Napoleon Bonaparte.

(*f*) In *Da Costa v. Jones*, 2 Cowper, 729, a wager, as to the sex of the Chevalier D'Eon, was held to be illegal. *Vide also Ditchbourne v. Goldsmith*, 4 Camp. 152, and some other cases of wagers, in a note to the report of this case, and in *Chitty*, 56.

(*g*) In an early case, *A v. B*, 9 Feb. 1676, Morr. 9505, the Court gave

effect to a wager, though some of their number were against it, on the grounds which have been ultimately adopted ; and, in another case, *Hope v. Tweedie*, 3 Dec. 1776, Morr. 9722, the Court appears to have recognised the legality of wagers in general, though they did not give effect to the wager then in question. But it is now finally decided, *Bruce v. Ross*, 26 Jan. 1787, M. 9523, affirmed 3 Pat. App. 107, and *Wordsworth v. Pettigrew*, 15 May 1799, Morr. 9524, that wagers are not actionable. In the first of these cases there were two objections : 1. That no wager could be sustained ; and, 2. That the wager in question was contrary to public policy. The decision was affirmed upon appeal on the first ground, as appears from Mr J. Buller's opinion, 3 T. R. 697, where he expresses a wish that the question were also recon-

may refuse to try a wagering question, except for the purpose of recovering money from the stakeholder (*a*). 6. A bond or agreement, which has the effect of restraining the granter from marriage, has been found in England not to form a ground of action (*b*). 'On the other hand, a bill granted to a woman as a security of a promised marriage, is valid, and may be enforced against the man if he break his promise (*c*).' 7. Both in England and Scotland, all agreements stipulating rewards for bringing about marriages are invalid (*d*). 8. Though some restraints on natural liberty are ineffectual, and therefore illegal considerations of a bill or note, such as an obligation to perpetual banishment (*e*), or perpetual servitude (*f*); yet it has been held 'in some old cases, which would probably not now receive effect,' that an engagement to work for hire during life is effectual (*g*). With regard to restraints of a

sidered in England. Lord Mansfield, in 2 Cowp. 735, and Mr J. Ashurst, as well as Mr J. Buller, in 2 T. R. 615-16, express a decided opinion against the propriety of giving effect to wagers.

(*a*) *Hasleton v. Jackson*, 8 B. and Cr. 221. *Vide also Bate v. Cartwright*, 7 Price, 540; and *Graham v. Pollock*, 5 Feb. 1848, 10 D. 646.

(*b*) In *Low v. Piers*, 4 Burr. 2225, judgment was arrested on a bond wherein the defendant had agreed to pay L.1000 to the plaintiff if he married any other woman than her. In *Hartley v. Rice*, 10 East. 22, judgment was given on the same ground, against a bet of fifty guineas, which the plaintiff was to lose if he married within six years.

(*c*) *Calder v. Provan*, 12 Jan. 1744, 1 Pat. App. 359. This decision is, however, not reconcilable with *Low v. Piers*, quoted in the preceding note.

(*d*) *Campbell v. Burns and Stewart*, 6 June 1676, Morr. 9505, Lord Fountainhall says that this, which seems to have been the first process of the kind, moved "laughter;" but he does not mention how it was decided. In *Buchan v. Cochran*, 1698, M. 9507, a bond of this kind, for L.1000, had been

found null by the Court of Chancery in England; but the creditor having charged upon it here, at least so far as regarded his expenses incurred in the debtor's business, the Court appointed him first to condescend on the particulars of those expenses. But it does not appear how the case was at last decided. The point was, however, settled in the case of *Thomson v. M'Kaile*, 14 Feb. 1770, Morr. 9519, being the case of a kind of promissory-note granted by the parents of a young man, payable on condition of his being provided by the payees with a suitable wife. The Court, after full discussion, found that such an obligation was *contra bonos mores*, and therefore could not support an action. In England, such bonds have been long discouraged. *Vide Drury v. Hooke*, 1 Vern. 412; *Duke of Hamilton and Ux. v. Lady Mohun*, 2 Vern. 652. *Vide also Chitty*, 58, and authorities there cited.

(*e*) *Wedderburn v. Monorgun*, 6 March 1612, Morr. 9453.

(*f*) *Laird of Caprington v. Giddow*, 24 March 1632, Morr. 9454.

(*g*) *Ersk*, i. 7, 62; *Reid*, 13 Feb. 1687, 1 Fountainhall, 439; 1 Bell, 302.

different kind, viz., restrictions on the freedom of trade, it has been decided that an engagement not to trade at all within this country is illegal and ineffectual; but that an agreement not to trade in a certain place, or within a given distance of it, is valid (*a*). By the 5 & 6 Ed. VI. c. 16, and the 49 Geo. III. c. 126, which extends it to Scotland, and likewise applies it to a greater number of cases, all agreements, bonds, or engagements of any kind, concerning the sale of offices connected with the administration of justice, or in the gift of the Crown, or any of the other offices described in these two statutes, are void as respecting the parties between whom the agreement was made (*b*). Analogous to this case, in point of principle, is an agreement, for gain, to recommend a person to an office in the army. Relief was given in equity against a promissory-note granted by a subaltern to his colonel for procuring him promotion (*c*).

All contracts made with an alien enemy during war are illegal, 'and, not merely voidable, but void' (*d*). It has therefore been decided in England (*e*), that a bill drawn during war, by an alien enemy, on a merchant in London, and indorsed to a British subject, privy to the original contract, could not produce action at the indorsee's instance, even on the return of peace. On the same

Contracts with
alien enemies.

(*a*) *Watson v. Neuffert*. 14 July 1863, 1 M'Ph. 1110. *Vide Hunlock v. Blacklowe*, 2 Saunders, 156, note 1; *Mitchell v. Reynolds*, 1 P. Williams, 189; *Cheesman v. Naish*, 2 L. Raym. 1456; and *Davis v. Mason*, 5 T. R. 118, which go to establish both points. The last case was an agreement of this kind by a person on being admitted as assistant to a surgeon apothecary. In Scotland, in the case of *Stalker v. Carmichael*, 15 Jan. 1735, Morr. 9455, where, in a contract of copartnery between two persons to carry on bookselling in Glasgow, to last for three years, it was stipulated, that either of them declining to renew the partnership after that period should be debarred from trading as a bookseller in Glasgow (that city being then judged too narrow for two booksellers), the Court, in a reduction of the contract,

sustained this clause, as "not contrary to the liberty of the subject." As to the limits of such an agreement, *vide Young v. Timmins*, Tyrwh. 225, where it was held, that an agreement to restrain an individual in a particular trade, but without an adequate consideration, and also a note which he had granted for damages arising from breach of agreement, were void.

(*b*) This subject, as well as the legality of selling offices in Scotland at common law, is fully discussed in Brown's Law of Sale, 116-30.

(*c*) *Whittingham v. Burgoyne*, 3 Anstr. 900.

(*d*) *Griswod v. Waddington*, 16 Johns, R. 438.

(*e*) *Willieson v. Pattieson and Others*, 7 Taunt. 439. *Vide also Ogden v. Peele*, 8 D. and R. 1.

principle, it has been decided in Scotland (*a*), that when bills accepted by one British subject are transferred by an alien enemy to another British subject, who knows of the declaration of war between the indorser's government and this country, the latter cannot maintain action on them; it being held, that, by receiving bills which he knows to be enemy's property, he has made himself an instrument for enabling the enemy to sue in our courts. In a subsequent case (*b*), where the acceptor of a bill payable to an alien enemy was charged for payment by an indorser, who admitted that he held the bill for the payee's behoof, the Court would not even entertain the claim, so far as to order caution for its amount till a peace, but simply sisted procedure. A similar opinion and judgment is said to have been given in another case (*c*). In all these cases the British indorsee was privy to the original illegality of the contract, and therefore his right was held to be as invalid as that of the original creditor; and, in the first case, he was not even allowed to sue upon it after the return of peace. The place where the bill is drawn, and the names of the parties, will be often indications of the true nature of such a transaction. But if it does not appear that the indorsee knew of the original payee, or the person from whom he took the bill or note, being an alien enemy, he would seem to have a good right of action, since the exclusion of the original parties is founded merely on their peculiar and personal character of alien enemies, which does not infer total nullity of the obligation.

Exceptional
cases.

It has been decided, that a British subject in an enemy's country—for instance, a prisoner of war—may validly grant a bill or note to another British subject resident there (*d*), or to any other person not an enemy (*e*). “A state of war does not suspend the rights of commerce between neutrals, or the general obligations of contracts between persons, who are, in no just sense whatever, parties to the war, or acting in violation of the duties growing out of it” (*f*). If

(*a*) *Johnson v. Goldsmith*, 15 Feb. 1809, F. C.

(*b*) *Carron v. Cowan*, 28 Nov. 1809, F. C.

(*c*) *Wright v. Hutcheson*, 17 Jan. 1810, F. C.

(*d*) *Antoine v. Moirhead*, 6, Taunt. 237.

(*e*) *Houriet v. Morris*, 3 Camp. 303.

(*f*) Story, §103; and *The Hoffnung*, 2 Rob. R. 162; *The Cosmopolite*, 4 Rob. R. 8; *The Clio*, 6 Rob. R. 67, there quoted.

a bill or note, drawn in favour of a British subject residing in the enemy's country, is indorsed by the payee to an alien enemy, for instance, by an English prisoner in France to a French banker, 'for the purpose of obtaining the necessaries of life;' or if a prisoner should, 'for the same purpose,' draw a bill on a person in this country, payable directly to an alien enemy (*a*), the title of the latter is held to be good, 'as it is not for the interest of a country to do what would prevent such of its subjects as were unfortunate enough to be made prisoners from obtaining the means of living;' so that, although he cannot sue on it during the war, the indorsee, or a person acting as his trustee (*b*), may do so after the return of peace (*c*). 'It would seem that the objection applies only to the alien enemies themselves, and that the bill may be valid as between the other parties to the bill (*d*).'

In a case (*e*) of four bills drawn by an English prisoner, then in France, on a person in this country in favour of a Frenchman (which, as they stood originally, were invalid under a temporary Act, 34 Geo. III. c. 9, § 2, not applicable to the other cases already cited), Lord Ellenborough, in an action against the drawer (the drawee having refused to accept them), held, that though the bills were void originally, a promise of payment made by the drawer during the subsequent peace was binding. This decision appears to proceed on a specialty of English law, according to which even a verbal promise is binding, if made on a good consideration, such consideration being held to exist in this case. In Scotland, nothing short of a written obligation could have been admitted; and this would have been binding, whether made on a consideration or not.

Confirmation
after peace.

Parties concerned in smuggling have no claim either for delivery of the smuggled goods, or for the price of them when delivered, and, consequently, cannot sue on a bill or note granted on that account. *First*, No party to a contract for smuggling goods can have a legal claim under it (*f*). But a person settled

Bills for price
of smuggled
goods.

(*a*) *Daubuz v. Morhead*, 6 Taunt. 332.

(*b*) *Ibid*.

(*c*) *Antoine v. Moirhead*, note (*d*), p. 74.

(*d*) Story, § 104.

(*e*) *Duhamel v. Pickering*, 2 St. 90.

(*f*) *Cantley v. Robertson*, 11 Feb.

1790, M. 9550; *Young v. Imlach*, 7 July 1790, M. 9553; *Nishet's Cr. v. Robertson*, Jan. 1791, M. 9554; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Cullen v. Philp*, 15 May 1793, and *Reid v. Macdonald*, 15 May 1793, M. 9554-5.

abroad, whether foreigner or native, has an action here for the price of goods sold and delivered by him abroad, though he should know that they are to be smuggled into this country, unless he was a party to the smuggling (*a*). *Secondly*, A party buying contraband goods in this country, when he knows that they are contraband, cannot enforce delivery of them, or claim damages for breach of contract (*b*). *Thirdly*, Although it was once held, that a smuggler who had sold goods within the country after they were smuggled, had an action against the buyer, on bills granted for the price (*c*), the sounder opinion appears to be, that he has not (*d*).

Although the rule now stated appears to be the proper one in an action by the importer of smuggled goods for the price of them, it has been decided (*e*), that it does not apply in an action by a party who has bought the goods from the importer, against a third party to whom he has sold them, though the goods had not paid the duties, and were seized, as having been delivered without a permit. If such sale and delivery has been prohibited, it may be doubted whether, according to the principles already stated, any party can maintain action under the contract. But the Court held, that such a rule would introduce great embarrassment into retail trade, by enabling every customer to urge the objection. For the reasons already mentioned, no action on a bill or note, though granted originally for contraband goods, can be refused at common law to an indorsee, unless he is proved to have been concerned in the unlawful transaction (*f*). But a note indorsed to a French house by a party residing in England, for payment of French silks, while their importation was prohibited (*g*), was decided, in respect of

(*a*) *Holman v. Johnson*, 1 Cowper, 341; *Walker v. Falconer*, 27 Feb. 1759; and *More v. Steven*, 13 Nov. 1765, M. 9543-5; *Cullen and Co. v. Philp*, *ut supra*; *Greig v. Davidson*, 13 Jan. 1789, M. 9550; *Hodgson v. Temple*, 5 Taunt. 181; *Meux v. Humphries*, 3 Carr. and P. 79.

(*b*) *Scougal v. Gilchrist*, 16 Nov. 1736, M. 9537; *Cockburn v. Grant*, 11 Nov. 1741, M. 9539.

(*c*) *Wilkie v. Macneil*, 6 Nov. 1740, M. 9538; *Customs v. Morrison*, 27 Nov. 1723, M. 9533.

(*d*) 1 Bell's Comm. 307; *Brown on Sale*, 143; *M'Lure v. Paterson*, 3 Nov. 1775, 5 Br. Sp. 532; *Duncan v. Thomson*, 8 Feb. 1776, M. Ap. 1; *M'Lure v. Paterson*, 26 Feb. 1779, M. 9546. Opinions of judges, 2 Hailes, 829; 1 Bell's Com. 307.

(*e*) *Maclean v. Sword*, 5 Dec. 1788, M. 9549.

(*f*) *Richard v. Brackenridge*, 20 Feb. 1793, M. 1523, and Bell's Cases.

(*g*) By 50 Geo. III. c. 55, § 1.

the indorsee's concern with the importation, to be not actionable (a).

No bill or note granted by a bankrupt as a preference to particular creditors, in order to induce them to concur with the other creditors in a proposal of composition, 'or for concurring in, facilitating, or obtaining the bankrupt's discharge,' can produce action. 'This is specially enacted with reference to preferences by bankrupts under the sequestration statute, making them null and void (b); and it holds at common law with reference to preferences granted by bankrupts under private trusts for the purpose of inducing consent by particular creditors to an offer of composition, to the extent at all events of refusing action on them in the hands of parties cognisant of the fraud (c).'

Preference
bills by bank-
rupts.

There are other transactions declared illegal by statute, which consequently exclude the parties concerned in them from maintaining action upon any bill or obligation arising out of them. Among these are the sale of any quantity of spirits, to the amount of less than 20s. at one time, on credit. This is declared illegal by 24 Geo. II. c. 40, § 12, which enacts, that "no person shall be entitled unto, or maintain any cause, action, or suit, or recover either in law or equity, any sum or sums of money, debt or demand, for or on account of any spirituous liquors, unless it shall have been really and *bona fide* contracted at one time to the amount of 20s." 'A bill granted entirely for furnishings of spirits below the value of 20s. at one time, is of course bad (d). Bills even partially granted for such furnishings are also bad.' Where the plaintiff had got a bill from the drawer, partly for money lent, and partly in consideration of spirits sold to an amount below 20s. at one time, the Court of Common Pleas, in an action against the acceptor, held, that the bill

Bills in trans-
actions illegal
by statute.

Tippling Act.

(a) *Billard v. Hayden*, 2 C. and Pay. 472.

(b) 19 & 20 Vict. c. 79, § 150. The English Bankruptcy Act, 1861 (24 & 25 Vict. c. 134, § 167), does not annul such preference bills, but subjects the creditors to a penalty of three times their amount. This would also have the effect of making the bill not actionable in the hands of a cognisant indorsee.

(c) *Cockshott v. Bennett*, 2 T. R.

763; *Jackson v. Lomas*, 4 T. R. 166; *Byrant v. Christie*, 1 Starkie, 329; *Leicester v. Rose*, 4 East. 372; *Wells v. Girling*, 1 Brod. and Bingham. 447; *Knight v. Hunt*, 5 Bingham. 432; *vide Britten v. Hughes*, 5 Bingham. 460; *Seager v. Billington*, 5 C. and Pay. 456; *Haywood v. Chambers*, 5 B. and Ald. 753.

(d) *Russel*, 6 July 1808, 1 Bell's Comm. 301.

was not effectual to the plaintiff, even for the lent money (*a*). ‘The same was held in Scotland, where a bill was granted partly for sales of liquors struck at by the Tippling Act, and partly for sales of other goods. There was considerable doubt on the point; but ultimately a majority of the judges adopted the English principle, that a bill in part for an illegal consideration was bad *in toto*, and reduced the bill (*b*).’ In an English case (*c*), where a bill for L.10, 7s., and a note for L.10, 3s. 6d., had been granted for an account composed of board and lodging, and of furnishings of spirits, and the latter did not amount either to the sum in the bill or that in the note, indefinite payments previously made were allowed to be imputed to the spirits (it being held that the statute merely prevented *recovery* of such a debt, not that it was void), and the plaintiff was allowed to recover on one of the securities, viz., the bill for the balance. ‘Strong opinions have been expressed by a majority of the Scotch judges, that this decision was wrong (*d*).’ It has been held (*e*), that the Act does not apply to furnishings made by one spirit-dealer to another, as its object was only to prevent tippling in the *consumers* of spirits.

Stock-jobbing,
and the like.

An engagement by a person, not possessed of stock, to pay or compound differences occasioned by the rise or fall of stocks, is illegal (*f*). It has been decided that promissory-notes, in so far as granted for the share of profits arising from such an illegal transaction, could not be ranked on the granter’s estate (*g*); and that even the indorsee of a bill granted on a similar account could not claim on it, when he was in circumstances that rendered him liable to the same exceptions with the original holder (*h*). ‘Transactions of the same kind in railway shares, or shares of joint-stock companies, are

(*a*) *Scott v. Gilmour*, 3 Taunt. 226; *Gaitshill v. Greathead*, 1822, 1 D. and R. 359; *Cruikshank v. Rose*, 5 C. and P. 19. An opposite decision appears to have been given by Lord Ellenborough at *nisi prius* in *Spencer v. Smith*, 1811, 3 Camp. 9.

(*b*) *Maitland v. Rattray*, 14 Nov. 1848, 11 D. 71.

(*c*) *Cruikshank v. Rose*, *ut supra*.

(*d*) *Maitland v. Rattray*, *ut supra*.

(*e*) *Jackson v. Atrill*, Peake’s C., N. P. 180.

(*f*) Prohibited by 7 Geo. II. c. 8; made perpetual by 10 Geo. II. c. 8. In *Faikney v. Raynons*, 4 Burr. 2070, the law on this subject is taken for granted, though it was held not to apply in the actual case. *Vide also Steers v. Lashley*, 6 T. R. 61, and *Thomas v. Newton*, 2 C. and Pay. 606.

(*g*) *Ex parte Bulmer*, 13 Ves. 313.

(*h*) *Brown v. Turner*, 7 T. R. 630.

also gaming (*a*).’ Private copartnerships for sea insurance (*b*); insurance on ships or lives by parties who have no interest in them (*c*); the sale of a vote, or bribery at an election (*d*); a simoniacal paction (*e*); an insurance in a lottery (*f*); or a contract to ransom a British ship, or goods on board of a ship which shall be captured by an enemy (*g*); or money expended by the payee in conducting an unlicensed theatre (*h*); have all been decided to form illegal considerations.

It has been decided, both in Scotland and in England, that a bill or note for apprentice-fee, not mentioned in the indenture of apprenticeship (so that the indenture may be written on a stamp conformable to it), cannot produce action or diligence at the payee’s instance, in consequence of the 8 Ann. c. 9, § 39, which enacts, that in such a case the agreement of apprenticeship shall be void, there being thus no consideration for the bill or note. This has been decided in a case (*i*), where it was held, that the master could not enforce a note for apprentice-fee, to the effect even of recovering the sum expended on the apprentice’s maintenance; and, on the same ground, a charge on a bill granted for apprentice-fee was suspended in Scotland (*k*). In another case (*l*), which was a reduction of bills

Bill for concealed apprentice-fee.

(*a*) 8 & 9 Vict. c. 109, § 18; *Grize-wood v. Blane*, 11 C. B. 538. But the contract between the speculator and his broker is not made illegal; *Foulds v. Thomson*, 10 June 1857, 19 D. 803.

(*b*) 6 Geo. I. c. 18; *Aubert v. Maze*, 2 Boss. and Pull. 371.

(*c*) 19 Geo. II. c. 37. *Vide Kent v. Bird*, 2 Cowper, 583; also *Roebuck and Another v. Hammerton*, 2 Cowper, 737, where this act was applied to a wager policy regarding the sex of the Chevalier D’Eon.

(*d*) *Sulston v. Norton*, 3 Burr. 1235; *The King v. Pitt*, 1 Bl. 380; in both of which cases the bribery was held to be unlawful, though it was said not to have had the effect of corrupting the voter.

(*e*) *Vide Morr.* 9578–83.

(*f*) *Vide* 1 G. IV. c. 72, § 35, and previous statutes regarding lotteries; also *Wyatt v. Bulmer*, 2 Esp. 537,

where the rule was taken for granted, though held not applicable to an onerous indorsee.

(*g*) Prohibited by 22 Geo. III. c. 25, § 1, and 45 Geo. III. c. 72; the last of which declares all bills, bonds, etc., granted in consideration of such a contract, to be absolutely void, except, however, in a case of extreme necessity, to be judged of by the High Court of Admiralty. In the case of *Webb v. Brooke*, 3 Taunt. 4, action was refused on a bill granted on account of such a contract, the plaintiff being held to be directly concerned in the transaction.

(*h*) *De Begnis v. Armstead*, 10 Bingh. 107.

(*i*) *Jackson v. Warwick*, 7 T. R. 121.

(*k*) *Donaldson v. Fulton*, 14 Feb. 1754, *Morr.* 587.

(*l*) *Shepherd v. Innes*, 19 Nov. 1760, *Morr.* 589.

granted for apprentice-fee, on this ground *inter alia*, the Court repelled that reason of reduction, as the apprentice-fee had been ultimately marked on an extract of the indenture, and the corresponding duties paid, holding that this was sufficient (in terms of the Stamp Acts of that period), even when done after the apprentice's death.

Gaming debts.

Gaming was early discountenanced in Scotland by the Act 1621, c. 14, which provides, that if any man win at carding or dicing above 100 merks within twenty-four hours, or gain at wagers upon horse-races above that sum, the superplus shall be consigned in the hands of the thesaurer of the kirk in Edinburgh, or in the hands of the kirk-session in the country, to be employed upon the poor of the parochie where such winning shall happen. In one case (a), the Court considered this Act to have been in desuetude in time past. But they declared that they would enforce it in future; and accordingly it has been enforced in several subsequent cases (b). But the law as to such securities for gaming debts (though not as to the other matters provided for by the Act of 1621) was changed by 9 Ann. c. 14, 'now repealed.' 'The matter is now regulated by the Act 8 & 9 Vict. c. 109, § 17 (c), which enacts, "That all contracts or agreements, whether by parole or in writing, by way of gaming and wagering, shall be null and void." This Act, in repealing the Act of 9 Anne, excepts so much of the latter as was altered by the Act 5 & 6 William IV. c. 41, which enacted that bills and notes within the operation of 9 Anne, in place of being held void, should be held to be executed for an illegal consideration. The effect of this enactment is not very clear; but it would appear to be that a bill or note for a gaming consideration is not null to all effects, but that a person who proved himself a *bona fide* holder for value could recover on it (d). Proof that a bill

(a) *Straiton v. The Laird of Craig-millar*, 19 July 1688, M. 9506.

(b) *Ramsay v. Grant*, 9 Feb. 1711, M. 10551; *Maxwell v. Blair's Trustees*, 14 July 1774, and 15 June 1775, M. 9522 and 10580.

(c) In *Foulds v. Thomson*, 10 June 1857, 19 D. 803, although no objection was taken at the bar, some doubts were expressed on the bench, whether

this statute was applicable to Scotland. The grounds of the doubt were not made very apparent, and the case was decided on the footing that the statute applied.

(d) Chitty, p. 59. *Hay v. Ayling*, 16 Q. B. 423, 20 L. J. (Q. B.) 171; *Fitch v. Jones*, 5 E. and B. 238, 24 L. J. (Q. B.) 293; *Don v. Richardson*, 16 June 1858, 20 D. 1138.

was granted for a gaming consideration may be by parole (*a*), but the person stating the objection must state clearly both the gaming transaction in which the bill originated, and the mode in which the holder became acquainted with it (*b*).

‘Gaming or wagering implies that there are two parties playing against each other. Advances made by a broker to pay differences on time bargains on behalf of a constituent, who had employed him to speculate (or gamble) in stocks, are not in this position, and therefore not illegal (*c*). Such advances are on quite a different footing from the transactions between the speculators themselves, which are struck at by the Act (*d*). On the same principle, a bill for money lent to a person to enable him to gamble, does not appear to be bad (*e*). Of course a bill granted for such a purpose as the payment of a horse-racing bet, is bad in the hands of all who know its origin (*f*).’

‘It is believed that there is now no instance of a statute declaring bills and notes to be null, which does not except the case of their coming into the hands of an onerous innocent indorsee. The decisions on the effect of bills null by statute, in the hands of such indorsees, are therefore not of much consequence now, and they are retained merely as illustrative of certain principles.’ In England, though a strong inclination was once expressed (*g*), to find such bills or notes available to *bona fide* onerous indorsees, it is settled by a long train of decisions, that when they are declared altogether null by statute, they cannot be made available to any purpose, in whatever hands they are placed (*h*). Indeed, it does not appear that the words of the different Acts, declaring the absolute nullity of the securities to which they refer, could be reconciled with the idea of giving them effect even in the hands of indorsees. The correct-

Case of indorsee of bill null by statute.

(*a*) *Sutton v. Ainslie*, 13 Dec. 1851, 14 D. p. 184; 11 May 1852, 1 M‘Q. 299.

(*b*) *Don v. Richardson*, *supra*.

(*c*) *Foulds v. Thomson*, 10 June 1857, 19 D. 803.

(*d*) *Grizewood v. Blane*, 11 C. B. 538.

(*e*) See *Robinson v. Bland*, 2 Burr. 1077.

(*f*) See opinion of English counsel, taken by Court in *Don v. Richardson*, 16 June 1858, 20 D. 1138.

(*g*) Per Gibbs, C. J., in *Jones v. Davidson*, Holt, 257-8.

(*h*) *Bowcr v. Bampton*, 2 Str. 1155; *Lowe v. Waller*, 2 Dougl. 735; *Young v. Wright*, 1 Camp. 139; and *Ackland v. Pierce*, 2 Camp. 599; *Jones v. Davidson*, note 1, by Gibbs, C. J.; *Lowes v. Mazzaredo*, 1 Stark. 385; *Shilleto v. Theed*, 7 Bingh. 405; *Aliker v. Howell*, 1 Nev. and Mann. 191; *Henderson v. Benson*, 8 Price, 281.

ness, therefore, of some early Scotch decisions, to an opposite effect, on this subject was long questioned (*a*); and it was at last deliberately decided, that the *bona fide* onerous indorser of a bill accepted for a gambling debt ' (then null and void under the 9th Anne),' had no claim on it against the acceptor (*b*). But it has been decided, that the *bona fide* and onerous assignee to a bond granted for such a debt has recourse against the cedent, although the warrandice should be from fact and deed only (*c*).

The law of England has adopted some modifications of the doctrine now mentioned (*d*), with regard to the indorsees of bills or notes declared null by statute :—

1st, Although the indorsee should be cut off from his action against the other parties to such a bill or note, he has a good claim against his indorser (*e*). This claim must be made either on the bill or note itself, or on the original consideration of indorsing it. In a case already referred to (*f*), the Court of King's Bench appear to have sustained action on the bill, holding, that though the words of the Act 9 Anne nullified all bills, notes, etc., generally, it could not be meant to nullify the obligation by the payee and indorser of such bills or notes to onerous indorsees. An indorsement has long been held to be a new bill by the indorser, in which he is liable to the indorsee as drawer (*g*).

2dly, If an indorsee to such a bill or note takes a new security,

(*a*) *White's Trustees v. Johnstone's Trustees*, 22 June 1819, N. R., noticed in 5 S. and D. 40; *Elliot v. Cocks and Co.*, 24 Nov. 1826, 5 S. and D. 40.

(*b*) *Hamilton v. Russell*, 18 May 1832, 10 S. D. B. 549.

(*c*) *White's Trustees v. Graham*, 16 May 1828, F. C. In another case, *Ballantyne and Co. v. Abud and Sons*, 15 Jan. 1828, 6 Shaw and D. 384, a majority of the Court (2d Division), viz., Lords Glenlee and Alloway, held, that an allegation of usury by the holders of a bill in acquiring it was not a good ground for passing a bill of suspension by the acceptors. But this opinion was not necessary for deciding the case, as the allegation was too vaguely made, and the presiding Judge

(Ld. J. C.) founded his opinion for passing the bill on this last point alone, while he reserved his opinion on the other point.

(*d*) Laid down in *Bower v. Bampton*, 2 Str. 1155.

(*e*) In *Edwards v. Dick*, 4 B. and Ald. 212, the drawer and payee of a bill for money won at play, who had indorsed it to a third party, having pleaded its nullity against his indorsee, the Court of King's Bench repelled the plea, holding that a different decision would (contrary to the policy of the Act) enable the winner of such money to retain it in his own hands.

(*f*) *Edwards v. Dick*, note *e*.

(*g*) *Vide Day v. Stuart*, 3 M. and Pay. 334, 6 Bingh. 109, where this

without knowing of the nullity that affected the old one, the new security will be good to him (*a*); such a security not being granted for any consideration struck at by the statutes. But when the indorsee, before he takes the new security, is aware of the illegal consideration of the former security, it has been held that, as to him, the new security is in the same condition with the old one, and that therefore it is void, as being taken by him in furtherance of the illegal consideration (*b*). Such a new security will of course be invalid, if granted to the person who is party to the original transaction (*c*). On the other hand, when a bill has been granted as a substitute for a previous bill which was null, and a third bill is then granted, merely for the purpose of raising money to retire the second bill, this third bill is not challengeable (*d*). It has been held (*e*), that when a note partly for money lent, and partly for a gaming consideration, was paid in part, and two separate notes of L.43 granted for the balance (either of them being sufficient to cover the gaming consideration), and one of them was

doctrine was held in an action by the indorser of a bill said to have been drawn for stock exchange differences against the drawer and indorser. In another case, *Greenland v. Dyer*, 2 M. and Ryl. 422, Dans. and Lloyd, 147, it was decided, that a bill accepted to the broker for repayment of illegal stockjobbing differences paid by him, is good to an onerous indorsee. In *Amory v. Mereweather*, 2 B. and Cr. 573, the contrary was decided, solely because the plaintiffs were held not to be *in bona fide*.

(*a*) *George v. Stanley*, 4 Taunt. 683; *Cuthbert v. Halley*, 8 T. R. 390.

(*b*) *Chapman v. Black*, 2 Barnew and Ald. 588. In this case, the plaintiff having first taken bills discounted usuriously by his indorser, without being aware of the usury, and afterwards, on learning it, having exchanged them for new bills, in which it was agreed that the name of the drawer who had discounted the former bills should be omitted; the Court of K. B. held that the plaintiff, by this trans-

action, lent himself to conceal the usury, and that therefore he must be in the same situation with the party guilty of it. In a later case, *Williams v. —*, 5 M. and Ryl. 121, where the plaintiff sued as indorsee of a note said to have been granted in lieu of one which had been given on a gambling transaction, a declaration by him before receiving the second note, as to the consideration of the first, was held to be admissible, and the Court refused to disturb the verdict for him.

(*c*) *Harrison v. Hannel*, 5 Taunt. 780. In *Wynne v. Callender*, 1 Russ. 295, the Court of Chancery decreed for redelivery of French bills, which the plaintiff had given to the defendant as substitutes for bills granted by him for a gaming debt, on account of the illegality of the consideration.

(*d*) *Marchant v. Dodgin*, 2 M. and Scott, 632.

(*e*) *Hubner v. Richardson*, 1819, Bayley, 516.

indorsed to the plaintiff, who knew nothing of the gaming, a promise by the granter of this note to pay the plaintiff was sufficient to separate his note from the gaming consideration, and to show that the defendant imputed this consideration entirely to the other note.

4. *Construction of Bills and Notes.*

General principles.

‘ When bills have been granted in one country, and are made payable or require to be enforced in another, questions of international law frequently arise. In solving these questions, courts are guided by the general principles applicable to all contracts, and are mainly influenced by a desire to give the fullest possible effect to the intentions of the parties. When a court of this country is required to construe a bill entered into in another, the first thing which it will regard will be the *lex loci solutionis*, if there happen to be a place of payment, designed, or necessarily implied, in the bill. The reason of this is obvious, as the parties must have had in view, to regulate their respective rights by the law of the place where these rights were to be made effectual. If there be no place of payment in the bill, the law which the court will regard will be the *lex loci contractus*, because the parties could have had no other law in view (a).

Different laws may be applicable to same bill.

‘ In regard to these general principles, there is no difficulty. In their application it is requisite to keep in view, that a bill which has passed in the course of its circulation through different countries will not be regulated throughout by any one law ; and it is necessary, in determining in every individual case, whether, and to what extent, a defender is liable, to have special regard to the law of the place where *he* is bound to pay, or had contracted. Thus the drawer of an unaccepted bill is bound to the payee by the law of the place where he drew it, because he is bound to pay it there (b). When the bill, however, is accepted, the contract between him and the acceptor will be regulated by the law which binds the acceptor, because the place of performance is within the jurisdiction of that

(a) The authorities for these general principles are collected in Story on the Conflict of Laws, § 233. The leading English cases are *Robinson v. Bland*, 1760, 1 Bl. R. 234, and *Potter*

v. Brown, 1804, 5 East. 124, both reprinted by Mr Ross.

(b) Story on Bills of Exchange, § 131 ; *Allan v. Kemble*, 1848, 6 Moore P. C. 314.

law (a). The indorsees of a bill are also, to a certain extent, bound only by the law of the place of indorsement,—their contract being, not to pay at the place of payment, but to pay at their own homes if payment at the proper place be refused. This qualification, however, of the general principles is to be understood as applying to questions which arise in enforcing payment, and not to questions on the *interpretation* of the contract, which are regulated always by the law binding the acceptor, or intended acceptor. This arises from the circumstance that the obligation of the indorsees is a secondary one; it being that the acceptor or other primary obligant shall perform his obligation. As regards the matter of interpretation, there is no difference between an accepted and an unaccepted bill. The meaning of the language used is fixed on the supposition that the bill would be accepted. The measure of the acceptor's obligation is therefore the measure of theirs. As soon, however, as his obligation has been broken, the measure of their obligation is fixed and becomes exigible. For damages consequent on non-fulfilment of their obligation as thus fixed, they are liable according to the law of their own place. In this way, it sometimes happens that an indorser, in whose country interest is high, may have more to pay on that account than he can recover from a prior indorser in whose country the rate of interest may be low (b).

‘These general principles have received various illustrations. The title by which the holder of the bill holds it, is good, if it is good according to the law of the place where he obtained it. It is not sufficient that it be good according to the law of the country where action has been brought, if it be bad according to the law of the place where it was made. In France, bills are not transferable by blank indorsement; and it has been held in England, that a person holding a French bill by a blank indorsement made in France, had no title to sue here, his title not being good according to the law of the place where it was made, though unquestionably good according to the *lex fori* (c).

Rule as to validity of holder's title to bill.

‘An exception has been made to this rule, by recognising as valid, in questions with the maker, transfers made according to the law of the place where the bill was made, and is payable. Thus it has been

(a) *Burrows v. Jemino*, 2 Str. 733. (c) *Trimbey v. Vignier*, 1 Bing. N. C. 151.
 (b) Story on Bills, §§ 141, 144, 153.

held, that English bank notes payable to bearer, are transferable in France by simple delivery, though by the law of that country they could not be transferred without indorsement (a).

Rule as to
validity of act
by which a
party becomes
debtor on a
bill.

‘The signature necessary to render a party liable on a bill may be the same act as that which gives the holder his title, or may sometimes be a prior act. In either event the rule is the same. The act must generally be valid according to the law of the place where it was done, irrespective of the law of the place of payment or of enforcement; because, if the act be not valid where made, there can be no obligation to pay, or contract to enforce (b). It must be executed according to the formalities of the *lex loci contractus*; and if there be any impediment existing according to that law disqualifying the defender from contracting, the contract must be held as null with regard to him in every court (c). The defence, for example, of infancy must always receive effect on this principle, though it may not be good according to the *lex fori* or *loci solutionis* (d).

Foreign stamp
laws not recog-
nised.

‘The courts of this country have recognised an exemption from the rules explained in the preceding two paragraphs, in so far as objections founded on the Stamp Acts of foreign countries are concerned. Notwithstanding the disapprobation of many eminent jurists, it is well settled that the Stamp Acts of foreign countries are not to be noticed in the courts of this (e). Colonial Stamp Acts are recognised (f).

Rules as to the
contract.

‘In considering more in detail the liability of a defender on a bill raising questions of international law, four points may be regarded; namely, to whom, under what conditions, for how much, and for what length of time, he is to be held accountable.

To whom the
debtor is
accountable?

‘The acceptor or other debtor is bound to account to every person to whom the bill, as originally drawn, has lawfully been transferred. If the bill be so worded as to be negotiable according to the *lex loci contractus*, it is negotiable everywhere, and even in countries where bills drawn in similar terms would not have been negotiable. A bill made in Scotland, payable to a person named, without

(a) *De la Chaumette v. The Bank of England*, 1831, 2 B. and Ad. 385.

(b) Chitty, pp. 81, 118.

(c) Story on Bills, § 137.

(d) *Male v. Roberts*, 3 Esp. R. 163.

(e) *James v. Catherwood*, 3 D. and R. 190; *Wynne v. Jackson*, 2 Russel, R. 351.

(f) *Alves v. Hodgson*, 7 T. R. 241; *Clegg v. Lery*, 3 Camp. 166.

adding the words, or order, is therefore transferable by indorsement in England, though, had the bill been made there, it would not have been so transferable (a).

‘If there be any equitable defence to which the debtor is entitled by the *lex loci solutionis* (or *contractus*), he is entitled to it by the *lex fori* (b). And if the contract, though expressed in absolute terms, be really according to that law conditional, it must be so treated in our courts (c).

Under what conditions the debtor is accountable.

‘The amount payable is regulated by the place of payment, if there be one, and if not, by the place of the acceptor’s residence. If there be different currencies at the residences of the drawer and of the acceptor, that of the latter will be understood. This will be so even if the bill be unaccepted, because the meaning of the drawer is plain, that the holder is to receive for the bill such an amount of money as the acceptor would have paid on it (d). In calculating interest, each party pays interest, after the date of the dishonour by him, according to the law of the place where he is bound to pay the principal (e).

For what sum accountable.

‘The general principle in regard to the length of time for which the debtor is to remain accountable, is, that the debtor is held, by the *lex fori*, bound so long as he would have been bound by the *lex loci solutionis* (or *contractus*). The same law which regulated the constitution of the contract, governs its duration. And if, according to that law, there be any prescription absolutely discharging the bill after a certain period, it would seem that the *lex fori* is bound to give effect to it. This is laid down by Story (f). The same principle is announced in an old Scottish case (g), though the application in that case was erroneous, the Court having confounded the English statute of limitations with a proper prescription. The converse of the proposition has been decided. The House of Lords held, that the Scottish Act introducing the negative prescription did not apply to English bonds on which it became necessary to sue in Scotland (h).

For how long accountable.

(a) <i>Robertson v. Burdekin</i> , 14 Nov. 1843, 6 D. 17.	4 May 1841, 2 Rob. Ap. 267 ; Story on Bills, § 148.
(b) Story on Bills, § 163.	(f) Story on Bills, § 142.
(c) <i>Burrows v. Jemino</i> , 2 Str. R. 733.	(g) <i>Lovat v. Forbes</i> , 2 Dec. 1742, M. 4512.
(d) Story on Bills, § 144.	
(e) <i>Gibbs v. Freemont</i> , 6 July 1853, 22 L. J. (Ex.) 302; <i>Fergusson v. Fyffe</i> ,	(h) <i>Delvalle v. York Buildings Co.</i> , 12 Mar. 1788, M. 4525, 3 Pat. Ap. 98.

‘ Whatever is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere. This was laid down by Lord Ellenborough, on the authority of Lord Mansfield, in a case where an American who had drawn an unaccepted bill in America was held as discharged in this country, by a certificate obtained in a bankruptcy there (a).

Rules as to
mode of proof.

‘ The last principles which it is necessary to point out are, that everything connected with the mode of proof, and the nature of the remedy, is regulated according to the rules of the courts of the country where enforcement is sought.

Proof of
obligation.

‘ A bill is probative as a title to the pursuer in the Scotch courts, though it might have required to be corroborated by other evidence in the courts of the country where it was made. Accordingly, it is not necessary for the holder of an English bill in Scotland to prove the handwriting of his debtor. If, however, a Scotch bill be sued on in an English court, the creditor must conform to the English rules of evidence, and lead proof, exactly as if the bill were an English bill.

Proof of
defences.

‘ In like manner, the proof that is necessary to rebut the presumption of debt raised by a bill, must be according to the *lex fori*. The *substance* of the defences admissible is governed by the *lex loci solutionis* (or *contractus*), but the *mode* of proving these defences must conform to the rules in use in the country where action is raised. Where proof of any objection, as of want of value, is limited in the case of a Scotch bill to proof by writ or oath, it stands so limited in the case of foreign bills also, though in their own country proof of the objection might have been competent by parole (b).

Rules as to
remedy.

‘ The remedy afforded by the Scotch courts on bills, may be either more or less extensive than that afforded in their own country ; for in this respect all bills are here alike. Thus all bills are entitled to the benefit of summary execution, though that may not be competent by the *lex loci contractus* (c) ; and, following the example of the English courts, it would be held that personal diligence was

(a) *Potter v. Brown*, 1804, 5 East. 124.

(b) *Mackenzie v. Hall*, 12 Dec. 1854, 17 D. 165 ; and *Robertson v. Burdekin*, 14 Nov. 1843, 6 D. 17,

overruling *Glynn v. Johnston*, 8 June 1830, 8 S. 889.

(c) *Don v. Kealy*, 13 June 1850, 12 D. 1016 ; *Mackenzie v. Hall*, 12 Dec. 1854, 17 D. 165 ; *Strathearn v. Masterman*, 25 June 1850, 12 D. 1087.

competent on (for example) a Portuguese bill, though, by the law of Portugal, such diligence is incompetent (*a*); and, following the example of the American courts, it would be held that an indorsee could, in all cases, sue here in his own name, though in his own country it might be necessary for him to sue in name of the original payee (*b*).

‘The limitations which our rules place on the execution of Scotch bills are applicable also to foreign bills. This was doubted at one time, and in the books conflicting decisions were formerly to be found. These were reviewed in Lord Brougham’s judgment in *Lippmann v. Don* (*c*), where the principle of the rules as to proof and remedy being regulated by the *lex fori*, was fully established. In that case the actual point decided was, that the so-called sexennial prescription was applicable to a bill drawn in France and sued on in Scotland.’

SECTION III.

DELIVERY OF BILLS OR NOTES.

1. *Delivery, when necessary.*

A bill or note, when completed in all its parts, is, in general, delivered to the payee.

With regard to the question, how far delivery is necessary to give a right of action on it, 1st, The *person mentioned in a bill or note* as payee does not, in general, get right to it without delivery. For, while it is in the hands of the drawer or maker, this circumstance affords a presumption, either that it was never issued (the maker or drawer having full power, till then, to alter its destination or to destroy it), or, if the term of payment is past, that it has been retired. ‘Even though the bill should pass from the acceptor’s hands to those of his agent, the bill is still undelivered, so long as it is in the agent’s hands. While there, the payee has no right to

Delivery by
maker.

(*a*) *De la Vega v. Vianna*, 1 B. and Ad. 284.

(*b*) *Lodge v. Phelps*, 2 Caine’s Cases in Error, 321.

(*c*) *Lippmann v. Don*, 26 May 1837, 2 S. and M. 682. In *British Linen Co. v. Drummond*, 1830, 10 B. and C. 903, an English court applied the statute of limitations to a Scotch bill.

it, unless the delivery be wrongously withheld (a).’ In England, delivery is considered as an essential part of the right. ‘Where a promissory-note, the making of which was unknown to the grantee, lay in the granter’s possession till it was found among his papers at his death, it was held that the grantee could not sue on it (b); and though such a note should be found accompanied by written directions to deliver it to the payee, the payee will still have no action, unless the directions be valid as a testament (c).’ In a case (d) where a note was deposited with a banker, with written instructions not to deliver it to the payee till he produced a certain other note cancelled, the payee’s right of action on the deposited note was held not to commence till its delivery, and therefore not to be barred either by the intervening bankruptcy and discharge of the granter, or by the statute of limitations, though six years had elapsed from its date. But, when the drawer is likewise payee, redelivery ‘by the acceptor to him’ is not ‘absolutely’ necessary; and it has been found (e), that, if the drawer delivered such a bill to the drawee for acceptance, and the latter admitted that he had accepted, the drawer was not bound, in an action for payment, to prove redelivery by the acceptor, but might give the latter notice to produce the bill ‘if he improperly retained it.’ As the bill, in this case, was given to the acceptor for a special purpose, it must be held, as soon as that purpose was served, that he retained it only for the drawer, from whom he got it.

Delivery by
indorser.

2dly, The case is different with regard to a bill that has been issued, and remains in the hands of the payee or other person entitled to it, with a special indorsation by him to a third party. If a bill or note is found thus indorsed in the payee’s repositories after his death, it may be doubted whether the indorsee’s right to it can be held completed without delivery. In one case (f), the grandson of a person deceased was found entitled to a bill which the latter had indorsed to him by name, and had delivered, without any special instructions, to his own son, who was likewise his general

(a) *Gordon v. Pilmore*, 31 Jan. 1724, M. 3519.

(b) *Disher*, 1 P. Will. 204.

(c) *Gough v. Findon*, 7 Exch. 48; 21 L. J. (Ex.) 58.

(d) *Savage v. Aldren*, 2 Stark. 232, per Lord Ellenborough.

(e) *Smith v. Maclure*, 5 East. 476; *Churchill v. Gardner*, 7 T. R. 596.

(f) *Carrick v. Key*, 6 Feb. 1787, Morr. 17009.

disponee. But it might be held, in this case, that there was a delivery for the indorsee's behoof. If the indorser is alive, there does not appear to be any ground for holding, that even a special indorsement by him conveys right to the indorsee without delivery. For, until delivery, the indorser has entire control over the bill or note; and it cannot therefore be held, that the indorsee has any right, when it depends on the pleasure of another. In a case (*a*), where bills were seized under a writ of extent at the instance of the Crown, after being specially indorsed to a third party, enclosed in a parcel addressed to him, and given by the indorser to a servant to be delivered to the postman, the Court of Exchequer preferred the Crown, holding that, previous to delivery, the indorsee had acquired no right, as the indorser had still the control of the bills. 'Where the indorser has delivered the bill to his own agent to be given to the indorsee, he can recall his instructions at any time before delivery; and if he do so, the indorsee cannot sue the agent for delivery' (*b*). The same rule would seem to apply, if such bills were attached in Scotland by diligence at the instance of other creditors of the indorser, or by a sequestration. With regard to a blank indorsation, there can be no doubt, since it cannot be known, without delivery, for whom it is intended. 'Where the executors had delivered a bill, found, blank indorsed, in a deceased person's repositories, to the person for whom they believed it to be intended, it was notwithstanding held, that the latter had no title, the indorsement being absolutely ineffectual because of the indorser's failure to deliver (*c*).'

Supposing, however, that a bill or note blank indorsed, or payable to the bearer—for instance, a banker's note newly executed, but not issued—were stolen from the maker, would the fact that it had never been issued *by him*, afford him a defence for payment against a *bona fide* holder? It does not appear that bills so acquired—for instance, new notes which have been got by breaking into a bank—should afford less ground of action or diligence against the maker than others. The want of delivery is a defect not apparent *ex facie* of the bill or note; and therefore creates only a personal exception

Delivery
obtained by
fraud.

(*a*) *The King v. Lambton*, 5 Price, 428.

(*c*) *Bromage v. Lloyd*, 1847, 1 Exch.

(*b*) *Brind v. Hampshire*, 1836, 1 M. 32.

and W. 365.

against the party who has got possession of it without delivery, not a radical nullity of title, such as can follow it into the hands of third parties. A party making an instrument transmissible to the bearer, incurs thereby the risk of its being put into circulation by a person acquiring it casually or fraudulently. The want of delivery would be equally pleadable with reference to subsequent indorsations, since delivery is as essential to the indorsee as to the original payee. But, in both cases, it seems to be only an objection personal against the party who has acquired the bill or note without delivery, 'or who acquires it with the knowledge that delivery of it had been fraudulently obtained' (a). The notes of a bank only projected would, of course, not be effectual, however complete they might be in point of form. But though they should be thus stolen before the bank commenced business, there would be a claim for payment of them after its commencement. 'Under the Mercantile Amendment Act, the holder of a bill, of which delivery had been thus fraudulently obtained by some previous holder, would have to prove that he gave value for it (b).'

Delivery of
bill consisting
of parts.

When a bill consists of several parts, each part ought to be delivered to the payee (unless one part has been forwarded to the drawee for acceptance, in which case the rest must be delivered), otherwise there may be difficulty in negotiating the bill, or in obtaining payment. 'An agreement to deliver foreign bills is not fulfilled by delivering one part only of each bill (c). If bills are drawn in sets in the United Kingdom, all the parts must be delivered, under pain of a penalty on the maker, and of losing all right to the holder to sue on them (d).'

2. *Effect of Delivery.*—*Obligations thence arising against the Party who makes it.*

Obligation of
maker.

The making of a note, including its delivery, implies an obligation by the maker to the payee, or any future indorsee, to pay the sum mentioned in it, according to its tenor. On the other hand, the drawing of a bill, including its delivery, implies an obligation by

(a) *Marston v. Allen*, 8 M. and W. 494, 11 L. J. (Ex.) 122.

(b) 19 & 20 Vict. c. 60, § 15.

(c) *Kearney v. West Granada Mining Co.*, 1856, 1 H. and N. 413.

(d) 17 & 18 Vict. c. 83, § 6.

the drawer to the payee, or any future indorsee, that the drawee is capable of binding himself for payment of the bill,—that he is to be found at the place described in the bill as his residence (if there is a description of it),—that, if the bill is duly presented to him, he will accept it in writing, according to its tenor, and that he will pay it when due (*a*). This engagement is absolute, so that, although the drawee should be prohibited from accepting or paying by the laws of a foreign country in which he resides, the drawer will still be liable in recourse (*b*). But he will not be liable if payment or acceptance has been prohibited by the law of this country (*c*). If any part of his engagement is not performed—for instance, if the drawee refuses to accept—the drawer will be liable in recourse immediately, although the term of payment has not come (*d*). Under this claim of recourse, he must pay, not only the principal sum in the bill, with interest and expenses, but also exchange or re-exchange, in so far as these are incurred by non-payment of the bill (*e*). But the full extent of this claim of recourse, as well as the mode of enforcing it, shall be explained afterwards, in considering the remedies competent against the parties to bills or notes.

3. *Effect of Delivery.—Obligations of Party receiving it.*

As a counterpart to the obligations now mentioned as incumbent on the drawer of a bill, the payee undertakes others, by the mere act of receiving the bill. These are (generally), to negotiate the bill, or, in other words, to take proper measures for obtaining acceptance and payment, ‘without granting extra time or other indulgence,’ as well as to give the drawer and previous indorsers due

Obligations of holder.

(*a*) Bayley, 43.

(*b*) In *Mellish v. Simeon*, 2 H. Black. 378, this point was decided against the drawer in an action of recourse brought against him, in consequence of non-acceptance by the drawee, who had been prohibited from paying by a decree of the French Convention.

(*c*) *Per* Alvanley, C. J., in *Pollard v. Herries*, 3 Bos. and Pul. 340, who lays it down, that “whatever be the nature of the contract into which a subject of this country enters, he is

excused from the performance of it if the laws of his country interpose and forbid the performance.”

(*d*) *Bright v. Purrier*, Buller’s N. P. 269; *Milford v. Meyer*, 1 Dougl. 54; *M’Carty v. Barrow*, 2 Str. 949, and 3 Wilson, 16, *per* C. J. Wilmot; *Workman v. Leake*, 1 Camp. 22.

(*e*) In *Mellish v. Simeon*, 162, note 3, where the bill was drawn at London on Paris, the drawer was found liable to the holder in the re-exchange between Paris and London.

notice in case of non-acceptance or non-payment. The particulars of due negotiation shall be afterwards explained: at present we shall only consider the extent to which these obligations are binding on the holder, and the result of his failure to perform them. By such failure he loses his recourse against the drawer on the bill, in case of its non-acceptance or non-payment.

Effect of taking
bill for a prior
debt.

Besides, if he has taken the bill on account of a prior debt, it is to be considered how far his failure in negotiation will not only cut off his recourse on the bill, but extinguish the debt.

Law of Scot-
land.

—
If bill not duly
negotiated, the
prior debt is
discharged.

In Scotland, it would appear, that, in such a case, scarcely any want of negotiation was at first sufficient to extinguish the previous debt, and for many years the law was in a state of great uncertainty on the subject (*a*). But the later decisions ‘(chiefly by the House of Lords)’ appear to have finally settled, that failure in due negotiation and notice by the holder of a bill or note, not only extinguishes his claim on the bill or note against the previous parties to it, but cuts off his claim even for the previous debt in satisfaction ‘or security’ of which it was given. Thus (*b*), where a creditor holding a bill in security for advances neglected to protest it, or to give notice of non-payment, and the acceptor became insolvent, the Court of Session ‘(following a former decision)’ held that he was not accountable for its amount to the party who gave it to him. But the House of Lords held that he was accountable for it. ‘In a case decided immediately after this, the House of Lords (again reversing the decision of the Court of Session) held that a person who had received bills in part payment of an account, was bound to give the remitter credit for them, though by neglect to negotiate them he had lost their proceeds (*c*).’ In another case (*d*), where the indorsee

(*a*) In the first edition a detail was given of the earlier decisions on this subject. This has been now suppressed, as no longer necessary. But those who wish to study the history of the law on this subject, may consult the following decisions: *Lindsay v. Gray*, 24 July 1629, Morr. 1543; *Earl of Newburgh v. Stewart*, 27 July 1666, Morr. 1543; *Henderson v. Muireson*, 25 July 1701, 4 Brown’s Suppl. 507; *Swinton v. Craigmillar*, 28 June 1706, *ibid.* 528; *Brown v. Home*, 14 Nov.

1705, Morr. 1546; *Hay v. Hall*, 6 July 1697, Morr. 11520; *Brand v. Yorstoun*, 10 July 1706, Morr. 1549; *Oswald v. Gordon*, 26 July 1711, Morr. 11521; *Earl of Leven v. Glencairn*, 20 Dec. 1711, Morr. 1553; *Alexander v. Cumming*, 19 Jan. 1758, Morr. 1582.

(*b*) *Murray v. Grosset*, 16 Feb. 1762, M. 1592; 17 Mar. 1763, 2 Pat. Ap. 81.

(*c*) *Brebner v. Haliburton*, 13 Dec. 1763, 6 Pat. Ap. 753.

(*d*) *Falls v. Porterfield*, 14 Nov. 1764, Morr. 1593.

of an inland bill, who got it in payment of previous advances, had failed in due negotiation, and where the drawee had become insolvent before any protest was taken against him, the Court 'of Session, guided by the decisions just quoted,' found that recourse against the indorser was cut off. 'These cases appear to have been taken as settling that a bill received in payment of a prior debt must be strictly negotiated, under penalty of losing recourse both for it and for the debt; but the Court of Session seems to have reverted to its old doctrine, where the bill was expressly taken only as a security. On this point, they were again instructed' by the House of Lords, which held that a bill indorsed in security required strict negotiation, 'in the same way as a bill indorsed in payment. In the case in which this was decided,' the holders were found to have forfeited, by neglect properly to negotiate a bill indorsed in security, all claim even on the former bill in security of which it was granted, although they had granted a receipt for the second bill, stating that the person who gave it should not be discharged of the first bill, until actual payment of the second was made (a).

These decisions appear to lead to this result, that, when a bill or note is taken in payment, or satisfaction, 'or in security' of a debt, any failure in negotiation cuts off not only the holder's recourse on the bill or note, but his claim for the original debt.

The converse of this doctrine is, that if the bill or note be duly negotiated, though not paid, the creditor's original claim, as well as his recourse on the bill or note, remains entire (b). "The giving of his bill of exchange, promissory-note, or other negotiable security, by the debtor, only operates as a conditional payment, unless the parties expressly or impliedly agree to consider it as an absolute payment" (c). This was expressly decided in one case (d), where a party who was creditor to another in a bill, having given it up, on receiving a draft from the debtor for its amount on a third party, was found entitled, notwithstanding, to recourse against the drawer

But if bill duly negotiated and not paid, the prior debt remains due.

(a) *Reid v. Coats*, 21 Feb. 1794, 3 Pat. Ap. 326. See also the short report of this case, M. 1620; and 1 Bell's Comm. 425.

(b) Bell's Principles, § 578; *Campbell v. Cruikshank*, 27 Feb. 1845, 7 D. 548; *Pattie v. Thomson*, 23 Dec. 1843,

6 D. 350; *Sinclair*, 19 Dec. 1823, 2 S. 600; *Oswald v. Gordon*, 26 June 1711, M. 11521.

(c) Story on Contracts, § 979.

(d) *Johnston v. Murray*, 1 Feb. 1715, Morr. 1556.

of this last bill (having duly negotiated it), on the drawee, failing to pay it. 'Where special circumstances clearly show that it was so intended, the taking of a bill for a debt may amount to payment (a). When the creditor takes a bill for his debt, that usually implies an agreement to give the debtor time till the bill be paid or dishonoured. It does not necessarily infer the waiver of a lien; and it is clear that the right of lien revives on the dishonour of the bill (b). The granting of a bill for a law-agent's account, does not prevent the account being taxed (c); but where there is evidence of arrangement when a bill is taken for a prior account, it would seem, from the rules of our law as to the presumption of value, that the amount of the bill would be presumed to be amount of debt then due.'

Law of Eng-
land.

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Taking a bill
does not dis-
charge prior
debt,

These rules are substantially the same with those established in England.

First, it has been there held, that the mere taking of a bill or note by a creditor from his debtor does not imply novation of the previous debt (d), unless that is expressed (e), but will be considered only as an additional security. Thus it has been decided (f), that taking a note for the balance of a debt does not cut off a claim for interest on another security previously granted for the same debt; the note being held, in these circumstances, to be merely an acknowledgment. It has been also held (g), that the circumstance of a traveller taking an acceptance for a debt from the defendant, but with an intimation that he did not think it would be received, and sending it to his constituent, who retained it, but without any drawer's name being filled up, did not preclude him

(a) *Stuart v. Blackwood*, 4 Dec. 1684, 2 Br. Sup. 67.

(b) *Gairdner v. Milne*, 13 Feb. 1858, 20 D. 565; *Johnston v. Duncan*, 16 May 1827, 5 S. 660.

(c) *Megget v. Douglas*, 2 Mar. 1826, 4 S. 514. Execution of diligence, however, will not in all cases be suspended till the accounts are taxed. *Stewart v. Lang*, 15 Jan. 1861, 23 D. 286.

(d) In *Taylor v. Wasteney*, 2 Str. 1218, it was held that the right to follow out an action, which had been raised for a debt, remained, notwithstanding a note for L.20 which had

been given subsequently by the debtor to the creditor. In *Scott v. Surman*, Willes, 406, the Court of King's Bench decided, *inter alia*, that the taking of a note by a factor for the price of goods consigned to, and sold by him, did not innovate the debt, so as to exclude the consigner from claiming for the price. See also *Owenson v. Morse*, 7 T. R. 64; *Tapley v. Martens*, 8 T. R. 451.

(e) *Brown v. Kewly*, 2 B. and P. 518.

(f) *Curtis v. Rush*, 2 Ves. and Beames, 416.

(g) *Vyse v. Clarke*, 5 C. and Pay. 403.

from suing for the debt. Further, when a party agrees to take a new bill as a substitute for a previous one, on which action had been raised, on condition of the defendant paying costs, but this last condition is not fulfilled, it has been held (*a*), that the original bill is still available. Lastly, if a person takes new bills in satisfaction of previous bills, retaining the former, however, in his possession, it will not be held that the last are absolutely substituted for the first, but the creditor will be entitled to sue on the first bills, if the last are not paid (*b*), 'or turn out of no value (*c*).' When a creditor has taken a bill or note in payment, he cannot sue on the original debt till the bill or note has become due, and has not been paid (*d*), unless it is known at once to be bad, or has been returned to the original payee by a party to whom he indorsed it, without money passing, and remained ever since unpaid in the payee's hands (*e*), or the bill, while unindorsed, is lost, and no demand is made on it (*f*), in which cases the debtor may be sued immediately on his original debt (*g*); or where it has been given for a smaller sum than the debt, in which case the debtor may sue for the differ-

but suspends
the remedy on
it,

(*a*) *Norris v. Aylett*, 2 Camp. 328, per Lord Ellenborough. But *vide Dillon v. Rimmer*, 1 Bing. 100.

(*b*) *Ex parte Barclay*, 7 Vesey, 597. This was decided by the Lord Chancellor, with regard to a claim made on the first bills against the debtor's bankrupt estate. The same doctrine was held in *Bishop v. Rowe*, 3 M. and S. 362, although dishonour of the last bill had not been notified to the drawer.

(*c*) *Bell v. Buckley*, 11 Exch. 631; *Sloan v. Cox*, 1 C. M. and R. 471. See note (*g*).

(*d*) *Belshaw v. Bush*, 11 C. B. 191; *Stedman v. Gooch*, 1 Esp. 3; *Rex v. Dawson, Wightwick*, 32 (holding that an extent in aid could not be issued on a debt for which the creditor took a bill, which had not fallen due at the date of the inquisition); *Kearslake v. Morgan*, 5 T. R. 513 (where, in an assumpsit for the price of goods sold, it was held a sufficient answer by the defendant, that he had indorsed a note for, and on ac-

count of, the goods); and *Walton v. Maskell*, 22 Dec. 1844, 14 L. J. (Ex.) 55.

(*e*) *Burden v. Halton*, 1 M. and Ryl. 223, 4 Bing. 454.

(*f*) *Rolt v. Watson*, 4 Bing. 273.

(*g*) *Bell v. Buckley*, 11 Exch. 631. In *Stedman v. Gooch*, 1 Esp. 3, an action brought for a debt, after taking three notes in satisfaction of it, was sustained, although the notes had not fallen due, they having turned out to be of no value. In an earlier case, reported in Anon. 12 Mod. 517, it was laid down that, if the seller of goods takes a goldsmith's note in payment, this will be good payment, though the goldsmith were worth nothing, provided the buyer did not know it; but that it will not be good if he did know it. *Owenson v. Morse*, 7 T. R. 64 (where a person, who had sold goods, and taken in payment certain notes on a banker who failed that day, was found entitled to stop the goods in

and may waive
a lien.

ence (*d*). 'Taking a bill in payment seems in general to determine a lien, to the effect of entitling the debtor to demand possession during the currency. Thus,' where a shipowner, who had a lien on the freighter's goods for the freight, had stipulated that part of it should be paid in "good and approved bills" at three months, and afterwards took a bill for this money and negotiated it (though he refused in words to receive it, as being a bad bill), the Court of King's Bench held, that by negotiating the bill, he must be held to have accepted of it in payment, and to have renounced his lien on the goods (*b*). In another case, a vendor, taking a promissory-note and negotiating it, was held to have relinquished his lien (*c*). But a person selling lands, and taking bills for the price, was held to retain his right of lien (*d*). 'The apparent conflict between these cases is probably to be explained by the circumstance, that in the former the facts showed an intention to rely solely on the personal security, and that in the latter they showed no such intention. If the bill be dishonoured while the goods are in the seller's hands, he may retain them (*e*).'

If bill be not
duly nego-
tiated, debt is
discharged.

When a bill or note, payable by any third person, has been taken for a debt, the creditor cannot sue for the original debt without showing that the bill or note has been duly negotiated, and has been dishonoured. What degree of diligence is necessary on such bill or note, and in what circumstances notice of its dishonour must be given to the debtor from whom it has been received, are questions to be discussed in considering the negotiation of bills or notes. If the creditor has failed in due negotiation, the debtor is released from all claim, even for the original debt. On this ground, a creditor

transitu); *Bishop v. Shiletto*, 2 B. and A. 329, where the same decision was given regarding the sale of iron, in payment of which bills were given which had not been retired. In *Puckford v. Maxwell*, 6 T. R. 52, where drafts taken in payment of a debt were dishonoured, the drawer having no effects in the drawee's hands, the creditor was found entitled to follow out diligence on the original debt. The same decision was given in *Wilson v. Vysar*, 4 Taunt. 287, and in *Cundy v. Marriot*, 1 B. and Ad. 696, where a bill, written on a wrong stamp, had

been indorsed in payment of the price of goods.

(*a*) *Thomas v. Heathorn*, 2 B. and Cr. 477, 3 D. and R. 647.

(*b*) *Horncastle v. Farren*, 3 B. and Ald. 497.

(*c*) *Bunney v. Poyntz*, 1 Nev. and Man. 232.

(*d*) *Ex parte Loaring*, 2 Rose's B. C. 79; *Grant v. Mills*, 2 Ves. and Beames, 306; *Hughes v. Kearney*, 1 Schwaes and Lefroy, 136; *ex parte Latey*, 2 Mont. and Ay. 609.

(*e*) *Valpy v. Oakley*, 16 Q. B. 941; *New v. Swain*, 1 Dans and L. 193.

who had taken a note by a third party, on account of a debt, was excluded from suing afterwards on the debt, by having delayed to ask payment of the note from 28th March to 15th May; the granter of the note, who failed on this last date, having paid larger sums in the meantime. It was held to make no difference that the creditor had given a receipt, bearing only that the debt should be held paid *when the bill was paid*, this being considered as no excuse to the holder for not presenting the note in proper time (a). The Court held the same doctrine, in a case where the creditor had delayed for four months to present a note which he got in payment of his debt, and, after the debtor in it became insolvent, brought his action for the debt. The jury had found for the creditor, on the ground that the note was not negotiable, not containing the words "or order." But the Court, holding that this made no difference as to the creditor, who had a sufficient right in his own person to have insisted for payment, granted a new trial (b). 'This doctrine was perhaps pushed to its extreme limits,' where a creditor, who had received in payment of his account bank notes on the day that the bank failed, and after the failure, was not allowed to sue on his original debt because he had not presented the notes for payment, or given notice to the debtor that he would hold him liable (c). In a previous case (d), the same rule had been applied, where the bank had failed, but after the note was given in payment, though before the time allowed for presentment had expired. In a case (e), where notes of a bank were paid to the plaintiff's hind, for his cattle, on Friday, but not paid over to the plaintiff by his hind till the Saturday evening on settling accounts, as the plaintiff was from home all Friday (the hind living in his master's house), and the notes were presented to the bankers on Monday, but they had failed between 3 and 4 P.M. on Saturday, it was decided that the plaintiff had not made the notes his own, but had still a claim for the price. When a person who has received a bill for the price of goods sold by him, nullifies it by altering the date of payment, he thereby loses his claim against the drawer, even for the price of the goods, as he has made the bill

(a) *Smith v. Wilson*, Andrews, 187.(c) *Camidge v. Allanby*, 6 B. and(b) *Chamberlain v. Delarive*, 2 Wils.

Cr. 373, 1 Ross, L. C. 366.

353. See also *Hebden v. Hartinsk*, 4(d) *Beeching v. Gower*, Holt, 313.Esp. 146, and *Kearslake v. Morgan*, 5(e) *James v. Houlditch*, 8 D. and R.

T. R. 513.

40.

his own, and the drawer could have no claim on it, after the vitiation, against the acceptor (a).

But if bill be not paid, though duly negotiated, the original debt is actionable.

On the other hand, when a creditor has used proper diligence on a bill or note held by him, and it is yet not paid, he is entitled to sue his debtor, not only by way of recourse on it, if his name should be on it, but likewise for the original debt, which is revived by its non-payment. 'There are many examples of the application of this doctrine. It was applied without difficulty to a case' where payment of a note, given in satisfaction of the debt, had been demanded the morning after it was given, by which time, however, the debtor had failed (b). The same thing was decided, though the creditor had given a receipt in full for the debt, and had taken in satisfaction of it a note payable in two months, which, however, he could not present till after that time, as the drawee could not be found during the whole two months. The drawee failed at the end of them. On the other hand, the creditor could not give notice to the debtor, from whom he got the note, as he was at sea all the time. Holt, C. J., held, that he had a good action for the original debt (c). In another case, an engine-maker, who furnished an engine to a colliery, having taken from the manager in payment a bill drawn by him on a bank at Durham, and both the bank and the drawer having failed before the term of payment, the Vice-Chancellor found the holder entitled, on giving up the bill, to get payment of the original debt from funds which were in Court (d). Where a shipmaster, after carrying goods to Ancona, took, in payment of the freight, a bill drawn on the freighter by his correspondent, to whom he had desired that the goods should be delivered, but which bill was neither accepted nor paid, the Court of King's Bench sustained an action for the freight against the freighter, holding that his acceptance of such a bill on the freighter's credit from his correspondent could not be considered as equivalent to payment (e). A similar decision was given, where a plaintiff having agreed to carry goods to Antwerp (the freight to be paid on delivery), and the freighter's correspondent or consignee there having given him cash for part of the freight, and

(a) *Alderson v. Langdale*, 3 B. and Ad. 660.

(b) *Ward v. Evans*, 2 Ld. Raym. 928.

(c) *Popley v. Ashley*, 6 Mod. 147.

(d) *Tempest v. Ord*, 1 Madd. 89.

(e) *Tapley v. Mehrrens*, 8 T. R. 451.

for the balance, a bill on a house in London, who accepted it, but failed before it became due, as did likewise the drawers, the plaintiff was found entitled to claim the balance of the freight from the freighters; it being held that there was no evidence of the plaintiff having preferred this bill to cash (in which case it would have been at his own risk), and that the bill being given by the agent, the principal was as much liable for the debt, on its turning out useless, as if he had himself given it (*a*). But when the captain of a ship takes a bill for his own accommodation when he might have had cash, he has no separate claim for the debt (*b*). Where a creditor, for furnishings on account of a ship, took a bill from the ship's agent for the amount, allowing discount, and afterwards renewed it to him twice, with interest, but where he did not appear to have preferred this arrangement, and where the principal had not looked into the agent's accounts, or given him credit on account of the arrangement, though the latter had funds of his more than sufficient to have paid the debt, the creditor was found to have a good claim against the principal (*c*). An action was successful on a charter-party against the charterers, when the freight was by the charter-party to be paid partly in cash and partly by approved bills, though the creditor had, without the knowledge of the charterers, taken a bill for the freight from the consignee, which was dishonoured (*d*). The same doctrine was adopted by Best, C. J., where the seller of goods was found entitled to sue for the price, though he had taken a bill for it, which was dishonoured, and was then lying protested in the hands of his agents (*e*); and where two bills which had been given in payment of the price of goods, having been delivered by the holder to a third party, but afterwards returned to him, without proof of any consideration passing between them, he was held to have a good action for the price of the goods, in respect of the bills not being paid (*f*).

The creditor will not be considered as taking the entire risk of this bill or note on himself, even though he has granted a receipt in full for the previous debt, on taking it (*g*).

(*a*) *Marsh v. Pedder*, 4 Camp. 257.

(*b*) *Strong v. Hart*, 6 B. and Cr. 160. 477.

(*c*) *Robinson v. Read*, 9 B. and Cr. 449.

(*d*) *Taylor v. Briggs*, 1 M. and Malk. 28.

(*e*) *Hadwen v. Mendizabal*, 10 Moore,

477.

(*f*) *Burden v. Halton*, 4 Bingham. 454.

(*g*) *Popley v. Ashley*, 6 Mod. 147.

Application of last rule to cases of payment by bank checks or notes.

In a case where the plaintiff having got a draft from the defendant's steward on a banker, in payment of work done for the defendant, and, on this draft being dishonoured, having, without informing the defendant, taken a new draft from the steward at twenty-one days' date, on non-payment of which he brought his action for the debt, the jury first found for the defendant, under the direction of Lord Ellenborough, C. J.; but afterwards his Lordship said that there must be a new trial, as it did not appear that the defendant had acted towards the steward on the supposition of the debt being paid. In other words, he had not suffered any injury through want of notice (*a*). 'Another illustration similar to the last may be given.' A sub-agent of the defendant, who owed the plaintiff money, having given his son in payment a draft on his bankers, which was dishonoured because the agent had overdrawn his account, and the agent having failed the same day with funds of the defendant (beyond the amount of the debt) in his hands, the defendant was, notwithstanding, found liable for the debt, it being held that the draft by his agent was the same as a draft by himself. No regard was paid to the plea, that the plaintiff's son might have had money if he had chosen, but preferred a check (*b*). It was evidently implied that the check must be a fair one, which this was not. If the creditor get a draft for his debt on bankers, desiring that it should be paid by a bill at seventy days, but, instead of taking such bill, allows the bankers to transfer the amount to his own account with them, this is held the same thing as if he had got the money, and afterwards deposited it with the banker, and therefore the debtor will be released (*c*). But the decision will be opposite if there has been no such transference to the creditor's account. Thus, where the buyer of some goods had given the seller in payment a draft on his bankers, payable at two months, by a bill to be given

(*a*) *Wyatt v. Hertford*, 3 East, 147.

(*b*) *Everett v. Collins*, 2 Camp. 515.

(*c*) *Bolton v. Richard*, 1 Esp. 106, 6 T. R. 139. In *Vernon v. Bouverie*, 2 Shower, 295-6, the plaintiff, having discharged a debt, on getting notes from the debtor on a banker, and, on discounting these notes, having preferred other notes to cash, was non-

suited in an action for the original debt, brought in consequence of the non-payment of the latter notes. In another case between the same parties, the plaintiff having preferred getting up a small bill which he owed the bankers to receiving cash from them, was likewise non-suited, on the ground of his having thus discharged the original debt.

at two months thereafter, but the bankers failed before the expiry of the first two months—the circumstances of the case being held not to infer that the creditor (who had likewise an account with them as his bankers) had given them any new credit for the amount of the drafts—a verdict was found for him, in an action on the original debt, and the Court of Common Pleas affirmed it (*a*). In a case (*b*) where the plaintiff paid into one country bank certain notes of another bank, and the former bank, on sending them to the latter, instead of taking cash for them, allowed them to be placed to their own credit, and permitted the receivers to re-issue them, the Court of King's Bench decided that they had taken the risk of them, and must be liable for them to the plaintiff as for cash. If the debtor pays his debt by a draft on his bankers, and the creditor, on being asked by them whether he will have cash or a bill or draft, prefers the latter, it is at his risk, unless there is manifest fraud, as where the bankers give him a bill signed by a party whom they know to be insolvent, or a draft on a house which has none of their effects (*c*). But, if a bill is given him without the choice of payment in cash, as where the draft which his debtor gives him on his bankers bears that they are to pay him by a bill, his original claim will remain if this bill, though duly negotiated, is not paid (*d*).

(*a*) *Brown and Richard v. Kewleys*, 2 Bos. and Pull. 518.

(*b*) *Gillard v. Wise*, 5 B. and Cr. 134, 1 D. and R. 523.

(*c*) The rule here stated is illustrated by the case (already cited) of *Vernon v. Bouverie*, 2 Shower, 295–6. In the case also of *Marsh v. Pedder*, 4 Camp. 257, Gibbs, C. J., expressed an opinion, that if the plaintiff had been offered cash, and had preferred a bill, the bill must have been at his own risk. The same rule was laid down by Bayley, J., in *Emly v. Lye*, 15 East. 13, per Lord Kenyon, C. J., in *Owenson v. Morse*, 7 T. R. 66, and by the Court of King's Bench in *Smith v. Ferrand*, 7 B. and Cr. 10, where a rule nisi for a new trial was discharged on that ground. On the other hand (with reference to the exception of fraud now

stated), in *Everett v. Collins*, 2 Camp. 515, a check was found to be no payment when given on a bank on whom the granter had already overdrawn, although the creditor's son who got it had preferred it when he might have had bank-notes. Farther, with regard to the case of a banker giving bills, Lord Kenyon, C. J., observed, in *Bolton v. Richards*, 6 T. R. 139, that, "if Caldwell and Company" (the bankers drawn upon by the debtors in that case) "had given the plaintiff a bill on an insolvent person for the amount of the plaintiff's check on them, it would have been too much perhaps to have said that that would have cancelled the plaintiff's demand."

(*d*) *Ex parte Dickson*, cited in *Bolton v. Richards*, 6 T. R. 142; *ex parte Blackburne*, 10 Vesey, 204.

These rules are applicable to the case of bills or notes granted for the price of goods sold, or for any other consideration at the time, as well as in satisfaction of previous debts; and, indeed, they have been already illustrated by decisions taken indiscriminately from both descriptions of cases (*a*). It has been held (*b*), that if a person gets a negotiable note for money lent, he cannot, without producing it, recover on the original consideration, though the note should be lost; because the note may be still in circulation, and thus (unless it were produced) the defendant might be subjected to double payment. The contrary has been found, where the bill is in his power, as when it is lying protested in the hands of his agent (*c*). But the rules with regard to the production of bills or notes shall be explained more fully afterwards.

Bill may preclude inquiry as to amount of prior debt.

It has been found (*d*), that, when an account is settled, and a bill on a third party given for the sum due, the account cannot afterwards be disputed, even in an action brought for its amount, upon the non-payment of the bill.

4. *Assignment of Funds by Delivery of a Bill or Note.*

Bill, as an assignment of funds,

But, besides the obligations which delivery of a bill or note creates betwixt the drawer and payee, the drawing and delivery of a bill, when properly intimated to the drawee, operates an assignment to the payee, to the amount of the bill, of any sum which is due by the drawee to the drawer. 'It sometimes happens also that an order or precept to pay, not effectual in all respects as a bill, is effectual as an assignation (*e*).'

(*a*) *Vide* on this subject *Owenson v. Morse*, and *Bishop v. Shiletto*, 97, note *g*; and *Brown and Richard v. Kewley*, 103, note *a*.

(*b*) *Dangerfield v. Wilby*, 4 Esp. 159, *per* Lord Ellenborough.

(*c*) *Hadwen v. Mendizabal*, 10 Moore, 477.

(*d*) 1 *Knox v. Whalley*, 1 Esp. 159 (decided by Lord Kenyon). The contrary appears to have been decided in an old case, *Chandlor v. Dorset*, Finch. 431, where an accounting between two partners was opened up on the ground of error, after a note had

been granted, on a settlement, for the balance due, and a verdict was found in another action for its amount, with costs. But this case will not outweigh the later decision. The case of *Trueman v. Hurst*, 1 T. R. 41, referred to by Chitty, 122, note 4, does not appear to be in point; since the only question there was, whether a note *granted by an infant* could prevent the settlement of accounts on which it was granted from being afterwards opened up. See also *Perry v. Attwood*, 6 E. and B. 691.

(*e*) *Brierly v. Mackintosh*, 1 June

This assignment, to be effectual, must be intimated to the drawee, by presentment of the bill. This doctrine has been settled by a number of cases (*a*), in which the date of intimation has been always adopted as the criterion of preference. Reference has been made to the opinion of two of our most eminent writers (*b*), which is said to be inconsistent with this doctrine. But that opinion, which imports that bills may be *transmitted* without intimation, evidently refers to their indorsement; and if it is held to refer to the indorsement of *accepted* bills (as it may fairly be, since bills are generally accepted before being indorsed), it is, as will afterwards appear, correct with reference to the assignment by indorsation of the funds in the acceptor's hands. At all events, it has no connection with the assignment of these funds to the payee, by *drawing* the bill. In another passage (*c*), Lord Stair seems to consider intimation unnecessary, with regard to assignments granted by merchants abroad, to transfer goods which are in Scotland; and he refers to an old case in support of this doctrine. But such a rule would not be followed, even with regard to a bill drawn abroad on a person in Scotland, considered as an assignment of the drawer's money in the drawee's hands. The rule in such a case is, that the law of the country where the assignment is to be completed prescribes the forms necessary for its completion; and that, therefore, the bill must be intimated by presentment to the drawee.

must be intimated.

Such presentment must, in general, be proved either by his acceptance, or by a protest for non-acceptance. In the case of a bill drawn payable at a particular place different from the drawee's residence—for instance, at a certain banking house—a protest taken at this place does not appear sufficient to carry the drawer's funds in the drawee's hands, unless there is proof that the draft was intimated personally to the drawee; for here, as in other assignments, the transference, in order to be complete, must be made known to the debtor. But although a protest, in case of non-acceptance, is the most common, it is not the only mode of proving presentment.

Evidence of intimation.

1843, 5 D. 1100; *Morrice v. Sprot*, 27 June 1846, 8 D. 918. *Per* Rutherford, *Watt's Trs. v. Pinkney*, 21 Dec. 1853, 16 D. 287.

(*a*) *Gordon v. Anderson*, 9 Dec. 1712; *Stewart v. Elliot*, 13 Feb. 1724,

M. 1463; *Mitchell*, 17 Nov. 1734, M. 1464; *Rob v. Chalmers*, Feb. 1737, M. 1465; and *Spottiswoode v. M'Niel*, 4 Mar. 1778, M. 1465.

(*b*) Stair, i. 11, 7; Ersk. iii. 5, 6.

(*c*) Stair, iii. 1, 12.

In one case (*a*), verbal intimation of a draft was held sufficient in a question between the payee and the drawee. 'In a question between an arrester of the drawee's funds, or the trustee for the drawee's creditors, and the payee, stricter evidence of intimation may be looked for. There is no case which goes so far as to hold that intimation may in this case be proved by parole. But it is clear that a notarial protest is not the only evidence in writing which is receivable. Thus, where a protest which had been used was invalid, entries in the drawee's books, showing knowledge of the bill, were held sufficient proof of intimation (*b*).' Perhaps a marking on the bill, a letter by the drawee admitting intimation, or other written evidence, might be sufficient; but it would be unsafe to rely on any but that which has been already sanctioned. 'In deciding the case last quoted, Lord Ivory gave the opinion, that if a drawee had acknowledged presentment by letter, that would be sufficient proof. Where there is judicial intimation, such as production in a multiplepointing to divide the funds of the drawee, that is of course sufficient (*c*).' It was said by a learned author (*d*), that verbal acceptance, even by anticipation, was sufficient to transfer the fund in the drawee's hands. But such evidence has been rejected (*e*).

Intimation of the bill to the drawee, when fully proved, completes the assignment (*f*). But,

Intimated bill
carries, as
assignment,

1st, A bill so drawn can only carry money 'belonging to the drawer' in the hands of the drawee, not money in the hands of bankers at whose house the bill is made payable (*g*).

(*a*) *Fairholm v. Gordon*, 1 Feb. 1724, M. 1462. In *Hill v. Lindsay*, 12 Nov. 1847, 10 D. 78, an assignment of shares in a company was held sufficiently intimated, in a question between the trustee for the grantor's creditors and the grantee, by the grantee having attended a meeting of shareholders and produced his title.

(*b*) *Watt's Trs. v. Pinkney*, 21 Dec. 1853, 16 D. 279.

(*c*) *Carter v. M'Intosh*, 20 Mar. 1862, 24 D. 925.

(*d*) 1 Bell's Comm. 398.

(*e*) *Cullen*, 18 June 1833, 11 S. D. B. 733.

(*f*) Such is the law regarding the effect of presentment in Scotland. It occurred to the author in consultation, whether the same effect would follow from presentment of a bill in England, to carry the drawer's funds *there* in the hands of the drawee; and he had reason to believe that presentment of a bill in England to the drawee would not have this effect. But this was a point of English law on which he did not hazard an opinion.

(*g*) This was decided in *Macleod v.*

2dly, Such a bill carries only money, not other effects belonging to the drawer in the drawee's hands. It has been held (*a*), that an inland precept, whereby the drawer desired his correspondent to account to a third party for a quantity of meal and iron belonging to him, is only an ordinary assignation, in competition with an arrestment of the same effects. In a much stronger case (*b*), of a draft for money which had been protested by the payee for non-acceptance, and was valid as a bill, it was, notwithstanding, found not to carry the drawer's effects in the drawee's hands in competition with a posterior arrestment, in respect that these effects, consisting of a cargo of fish, had not been turned into money at the date of the protest. The ground of this decision, as explained in the report, seems to have been, that a bill is only an assignation to a sum of *money* due by the drawee to the drawer, and that therefore it cannot take effect when there is no money due, though there should be effects for which he is accountable. It was admitted that the bill, being a continued mandate, would have ultimately given the payee a right to the money arising from the effects, if there had been no 'mid' impediment. But it did not operate as an assignment at the date of the protest, seeing the effects were not *then* turned into money, and, in the meantime, they were legally attached by the arrestment. These doctrines seem to follow from the nature of bills, since a bill, relating to money alone, cannot be held to imply an assignment of effects. No doubt, as it implies a continued mandate on the drawee to pay money, it will, if intimated, effect an assignment of cash in his hands when he realizes it. But this cannot happen when *the effects* are, in the meantime, attached by diligence. In England it is held that a payee has no direct interest even in bills or other effects deposited by the drawer with the drawee to cover his drafts, though it has been found that, should the drawee, after acceptance, and also the drawer, both become bankrupt, the payee may get payment indirectly through these effects, by the right of the acceptors or their assignees to retain

Money in
drawee's hands
due to the
drawer,

Crichton, 14 Jan. 1799, Morr. 16469, with regard to the effect of a bill made payable at the house of Sir William Forbes and Company, in assigning funds in *their* hands belonging to the drawer.

(*a*) *Anderson v. Turnbull*, 19 July 1706, Morr. 1460. See also *Dixon v. Bovil*, 29 July 1856, 3 M'Q. Ap. 1.

(*b*) *Stewart and Ewing* competing, 15 June 1744, Morr. 1493.

them till the drawer's assignees become bound to relieve them from the bill (*a*). But,

3dly, It has been held in Scotland (*b*), that a protested draft on bankers for value in account, implied an assignment to the payee of the *nomen debiti*, arising from another draft by the granter of the draft first mentioned on a third party, which draft had been deposited in the banker's hands to get payment, but was not yet due.

or to become
due to him.

4thly, A bill protested for non-acceptance will be preferred to a posterior arrestment, and also to a trust-deed for behoof of the drawer's creditors executed before the date of the protest, but not intimated to the drawee till after it (*c*), when money is certainly *due* by the drawee to the drawer at the date of the protest, though not immediately exigible (*d*). "Nothing is better settled than that an assignation may competently be granted of a right not yet vested; and that the right when it emerges will be fully carried by the assignation, provided only no mid impediment has intervened. An assignation may be competently granted of a *spes successionis*, the most contingent of all rights, and will be effectual to the granter when the succession opens; and in this particular the assignation implied in a bill or draft protested for non-acceptance, has been held to operate like other assignations" (*e*). But if the drawee should, at the time of the protest, owe the drawer less than the amount of the draft, the protest will not carry even the sum due, if the payee does not intimate his willingness to take such a sum as the drawee admits, or is inclined to pay (*f*). His protest is, in that case, a refusal to take anything unless he gets the full amount of the bill, and therefore the drawee is at liberty to dispose of the funds.

(*a*) The point now mentioned was decided by the Lord Chancellor in *ex parte Waring* and *ex parte Inglis*, 2 Rose's B. C. 182; also *Perfect, ex parte*, Montagu, B. Cases, 25.

(*b*) *Macleod v. Crichton*, ante, 106, note *g*.

(*c*) *Falconer v. Campbell*, 22 Jan. 1824, 3 S. D. 630.

(*d*) This was decided in *Campbell, Thomson, and Co. v. Glass and Son*,

28 May 1803, Morr. App. to Impl. Assign. p. 3.

(*e*) *Per* Lord Kinloch in *Carter v. M'Intosh*, 20 Mar. 1862, 24 D. 925, where it was held that an unaccepted bill, drawn by beneficiaries on testamentary trustees, operated as an assignation of legacies which had not vested at the date of presentment.

(*f*) *Hogg v. Fraser*, 29 Nov. 1786, Morr. 1521.

SECTION IV.

HOW FAR ALTERATIONS CAN BE MADE IN BILLS OR NOTES, AND
WHAT IS THEIR EFFECT.

‘The effect of alterations upon bills or notes is different, according to whether they are visible *ex facie*, or are not so visible.

Effect of
alterations,

‘It seems to follow from the principles settled in regard to alterations in the sum, that no alteration in a bill or note will render it invalid in the hands of an onerous indorsee, if room for the alteration have been left by the drawer’s carelessness, and the alteration be not visible *ex facie* (a).’ When the alteration is visible *ex facie*, an indorsee has himself to blame if he takes the bill; but otherwise he has a just claim against the previous parties for giving it currency, while so carelessly written that an alteration could be made on it without attracting notice. If the Court are satisfied from looking at the bill, that there has been no alteration, they will not proceed on a mere allegation to that effect (b). ‘But if it be offered to prove that a material alteration has been made (the offer being accompanied, if requisite, by caution or consignation), the proof may be allowed, and in England, at all events, the proof may be by parole. The effect of proving that an unseen alteration has been made, without the drawer’s fault, is to vitiate the bill in the same way as if the alteration had been visible. The remedy of a holder, who has taken it innocently, is to sue for the consideration he gave against his indorser, who again sues his indorser, and so on till the party is reached who committed the *laches*, and who therefore ultimately suffers (c).

when not
visible *ex facie*.

‘If a bill appear, upon inspection, minute (d) or otherwise, to have been altered in any material part, it does not authorize summary diligence (e). Where payment of such a bill is disputed, the substance

Effect of material alteration
appearing *ex facie*,

(a) *Ante*, p. 42.

(b) *Dobie*, 3 June 1823, 2 S. 358; *Stewart v. Bird*, 14 Nov. 1822, 2 S. 13.

(c) *Burchfield v. Moore*, 6 May 1854, 23 L. J. (Q. B.) 261 (addition of place of payment after issue); and *Gardner v. Walsh*, 5 E. and B. 83, 24 L. J. (Q. B.) 285 (addition of a new obligant after issue).

(d) The Court have sometimes remitted to engravers to say whether a bill has the appearance of being altered. *Hamilton v. Kinneir*, 17 June 1825, 4 S. 102.

(e) *M’Rostie v. Halley*, 2 Mar. 1850, 12 D. 816; and other cases quoted in the chapter on Summary Diligence.

of the rules explained in this section, is that the holder must bring an ordinary action, and that the burden is thrown on him of proving that the alteration was made, either (1) of consent, before the issue of the bill, or (2) of consent, for the purpose of correcting an error.

at common
law,

‘ At common law, any alteration on any material part of a bill or note, made without the consent of all parties, vitiates it. The bill is no longer the contract to which the parties have agreed ; and in order to prevent tampering with bills, the law has declared that it shall not be taken as evidence even of the original contract. And, it being the duty of the holder of the bill to preserve it intact, a materially altered bill is not evidence, even though the alteration should have been made by some unknown person, or even for some unknown purpose (*a*). It does not signify though the alteration should be to the holder’s disadvantage (*b*). It is immaterial by what mode the alteration is carried out, whether by erasure (*c*), by superinduction (*d*); or (where no improper blank has been left) by interpolation (*e*) ; and, though it is believed not to be uncommon to do so, it is important to note that to alter a lithographed form is just as much a vitiation as to alter manuscript (*f*).

and under the
Stamp Acts.

‘ At common law, a bill might be altered at any time, if consent of all parties were obtained. The effect of the Stamp Acts is to limit the time for alterations to the time before issue (*g*). As soon as the document has been issued completed in the form intended by the parties, the stamp has been exhausted ; and as any alteration after that comes virtually to be the making of a new contract, a new stamp is required. Of course this rule does not apply to the mere correction of an error made in reducing the original agreement to writing (*h*).

‘ In the application of the preceding principles, various questions may arise. It may be disputed, (1) whether the alteration was ma-

(*a*) *Master v. Miller*, 4 T. R. 320, 1 Ross, L. C. 667 ; *Murchie v. Macfarlane*, 1 July 1796, M. 1458.

(*b*) *Mitchell v. Stewart*, 9 July 1819, H. 78.

(*c*) *Armstrong v. Wilson*, 2 June 1842, 4 D. 1347.

(*d*) *Hamilton v. Monteath*, 1 Dec. 1824, 3 S. 345.

(*e*) *Watson v. Thomson*, 27 June 1798, H. 42.

(*f*) *M'Cubbin v. Turnbull*, 28 June 1850, 12 D. 1123.

(*g*) *Bowman v. Nichol*, 5 T. R. 547, 1 Ross, L. C. 698 ; *Cardwell v. Martin*, 9 East, 190 ; *Bathe v. Taylor*, 15 East, 412 ; *Home v. Purves*, 7 July 1836, 14 S. 898.

(*h*) *Whitehead v. Henderson*, 19 Feb. 1836, 14 S. 544 ; and other cases quoted, p. 114.

terial or immaterial ; (2) whether or not it was made for the correction of an error ; or (3) whether it was made before or after issue.

‘ The following alterations are accounted material :—

What alterations material :

‘ Alterations on the *date*.—Thus an alteration on the year (*a*), or on the month (*b*), or even on the day of the month (*c*), or on all the three (*d*), is accounted material. And such an alteration is held as material, even when the term of payment is fixed independently of the date (*e*).

Date.

‘ Alterations on the *sum* payable are accounted material.—Thus where the sum in a bill has been altered from a larger to a smaller (*f*), or from a smaller to a larger (*g*), sum, the bill is vitiated. An alteration even on the amount of the shillings, as by changing “ nine ” into “ nineteen,” has been held to be an objection to the ranking of a bill for voting on the election of a trustee on a sequestrated estate (*h*).

Sum.

‘ Alterations on the *term of payment* are material.—Thus if the term of payment be altered so as to make the bill payable one day after date, in place of on demand (*i*), or after date in place of after sight (*k*), or in a different year (*l*), the bill is vitiated. This of course does not prevent a party from resorting to other evidence of his debt (*m*).

Term of payment.

‘ If the bill contain a stipulation for *interest*, an alteration on the

Interest.

(*a*) *Russel v. M'Nab*, 14 Dec. 1822, 2 S. 88.

(*b*) *Jacob v. Hart*, 2 Starkie, 45.

(*c*) *Outhwaite v. Luntley*, 4 Camp. 179 ; *Corrie v. Barbour*, 26 Nov. 1825, 4 S. 228 ; *Walton v. Hastings*, 4 Camp. 223 ; *Master v. Miller*, 4 T. R. 320 ; *Murchie v. Macfarlane*, 1 July 1796, M. 1458 ; *Miller v. Robertson*, 21 May 1835, 13 S. 813.

(*d*) *Allan v. Young*, 5 Mar. 1800, M. App. Bill, 14.

(*e*) *M'Rostie v. Halley*, 2 Mar. 1850, 12 D. 816.

(*f*) *Leith v. Elphinston*, 16 Jan. 1734, Elchies, Writ, No. 1.

(*g*) *Watson v. Thomson*, 27 June 1798, H. 42. (In this suspension, the suspender admitting liability for the smaller sum, the diligence was found

orderly proceeded *quoad* it.) *Graham v. Gillespie* (second bill), 27 Jan. 1795, M. 1453. (Here, diligence even on the original sum being objected to, the letters were suspended *simpliciter*.) *M'Lean v. Morrison*, 20 May 1834, 12 S. 613 ; *Edinburgh and Glasgow Bank v. Forbes*, 13 July 1858, 20 D. 1426.

(*h*) *M'Cubbin v. Turnbull*, 28 June 1850, 12 D. 1123.

(*i*) *Murdoch v. Lee*, 26 Nov. 1801, 4 Pat. App. Ca. 261. The object was to make the bill bear interest.

(*k*) *Long v. Moor*, 3 Esp. 155, note ; *Anderson v. Langdale*, 3 B. and Ad. 660.

(*l*) *Hamilton v. Kinnear*, 17 June 1825, 4 S. 102.

(*m*) *Atkinson v. Hawdon*, 2 Ad. and Ell. 628.

rate is material. The stringency with which the Stamp Acts affect such alterations, is well illustrated by a case, where a bill was held vitiated by an alteration in the rate of interest, even when it was in favour of the debtor, and had been proved to be made of consent of both parties (*a*).

Drawers.

‘Alterations on the name of the *drawer* are material; as where the name of one of two drawers is deleted (*b*), or where the name of one drawer is substituted for another (*c*).

Indorsees.

‘Alterations on the names of the *indorsees* are also material; as where the christian name is changed from William to Thomas (*d*).

Acceptors.

‘Alterations on the names of the *acceptors* are material.—Thus the erasure of the name of one of two acceptors (*e*), or the addition of an acceptor (*f*), vitiates a bill. There is an observation in one very shortly reported case, to the effect that the addition of an acceptor is not material; but that observation must have had reference to peculiar facts, the addition very likely having been made before issue (*g*). In England, a joint and several note signed by two persons was held to be vitiated by the addition of a third obligant after delivery (*h*).

Consideration.

‘An alteration on the *consideration* stated is material.—For example, if a bill be expressed generally as having been granted “for value received,” and that be made specific, as by the addition of words showing that it had been granted “for the good-will and lease in trade” of a certain party, the bill is vitiated (*i*).

Place of payment.

‘Alterations on the *place of payment* are material.—Thus if a bill be payable “in London,” and these words be struck out, so as to make the bill payable generally (*k*); or if a bill be payable at a

(*a*) *Sutton v. Toomer*, 7 B. and Cr. 416. See also *Warrington v. Earley*, 2 E. and B. 763.

(*b*) *Callender v. Kirkpatrick*, 10 Dec. 1812, F. C.

(*c*) *Fleming v. Leiper and Scott*, 1 July 1823, 2 S. 446. The holder of the bill having no claim against the acceptors, except through it, was afterwards found to have no recourse whatever against them,—*Young’s Trs. v. Fleming*, 10 Mar. 1831, 9 S. 574.

(*d*) *Macara v. Watson*, 3 June 1823, 2 S. 360.

(*e*) *M’Ewen v. Graham*, 21 Nov. 1833, 12 S. 110.

(*f*) *Home v. Purves*, 7 June 1836, 14 S. 898.

(*g*) *Macara v. Watson*, 3 June 1823, 2 S. 360.

(*h*) *Gardner v. Walsh*, 5 E. and B. 83, 24 L. J. (Q. B.) 285.

(*i*) *Knill v. Williams*, 10 East, 431.

(*k*) *M’Cubbin v. Turnbull*, 28 June 1850, 12 D. 1130.

certain bank, and (on its insolvency) another bank is substituted (*a*); the bills are in either case vitiated. In like manner the addition of a special place of payment to a bill payable generally, vitiates it (*b*).

‘It seems to be understood that a party may sign a bill as cautioner after its issue, provided it was part of the original bargain that he should do so (*c*). An alteration upon the word “cautioner,” added to the signature,—as by deleting it, and substituting “conjunctly and severally,”—will vitiate the bill (*d*).

Cautioner.

‘Alterations which do not vary the responsibility of the parties are immaterial (*e*), and do not vitiate a bill. The addition of some explanatory memorandum,—for example, made for the convenience of the holder, as one showing where he would find his money when the bill became due,—is immaterial (*f*). In like manner the addition of words which explain, but neither enlarge nor contract the responsibility of any of the parties (though to be avoided as hazardous), do not tell against the bill as evidence (*g*). In this way a Scotch bill, on which the liability was already conjunct and several by force of law, was not held to be vitiated by the addition of the words conjunctly and severally (*h*). The supplying of an unimportant omission, such as that of stating on whose account a bill was drawn by a banker, when the facts as to the drawing were not in dispute (*i*); or the correction of a small error, such as that in an address, where there could be no dispute as to the person (*k*) or place (*l*); are not material. The filling up of a blank left inten-

What alterations are immaterial.

(*a*) *Tidmarsh v. Grover*, 1 M. and S. 735; *King v. Treble*, 2 Taunt. 329.

(*b*) *Burchfield v. Moore*, 6 May 1854, 23 L. J. (Q. B.) 261; *Cowie v. Halsall*, 4 B. and A. 197; *Macintosh v. Haydon*, 1 Ry. and M. 362.

(*c*) *Clerk v. Blackstock*, Holt, N. P. 474.

(*d*) *Robertson v. Annan*, 27 May 1825, 4 S. 40.

(*e*) *Per Ellenborough*, in *Marson v. Petit*, 1807, 1 Camp. 82; and to the same effect, in *Saunderson v. Symonds*, 1819, 1 B. and B. 426, the case of a policy of insurance.

(*f*) *Walter v. Cubley*, 2 Cr. and M. 151.

(*g*) *Doe v. Houghton*, 1 Man. and Ry. 208.

(*h*) *Gordon v. Sutherland*, 20 Jan. 1761, M. 14677. On an English bill such an alteration is material: *Perring v. Hone*, 2 C. and P. 401.

(*i*) *Commercial Bank v. Paton*, 28 June 1837, 15 S. 1202.

(*k*) *Farquhar v. Southey*, 1 M. and Malk. 17; *Dougal v. Robin*, 8 Feb. 1828, 6 S. 504; *King v. Creightons*, 11 May 1843, 2 Bell, Ap. Ca. 81.

(*l*) *Beattie v. Haliburton*, 18 Feb. 1823, F. C. (It is doubtful whether

tionally in a bill (*a*), and the deletion of an addition or indorsation made by mistake (*b*), have sometimes been classed as immaterial alterations; but, properly speaking, are not alterations at all.

Correction of errors.

‘Material alterations may sometimes be made on a bill after issue, provided they be made for the purpose of correcting an error, and of rendering the bill conformable to the original intention of the parties. Corrections of this kind, however, have only been permitted when they were made immediately on the discovery of the error, and with the consent of all parties (*c*). The most extensive alteration of this kind which seems to have been permitted, was that where a debtor, who had promised to give his creditor a bill, had sent him a note, which was at once returned to the debtor, and on being altered by him to a bill, again issued to the creditor (*d*). The addition of the words, “or order,” to make an English bill negotiable, added of consent, and in furtherance of the original intention, has been held not to vitiate (*e*). In like manner corrections on the date have been permitted (*f*); and the principle would, of course, extend to any material alteration.

When a bill is held to be issued in this question.

‘A bill is held to be issued as soon as delivery of it has been accepted by any one entitled to enforce payment of it from the deliverer. While it is in the drawer’s hands, or even while he is in the act of getting it accepted by the drawee (*g*), alterations are competent. But if the drawee have parted with it, as by delivering

the Court did not go too far in disregarding the particular alteration in this case.) *Dobbie v. Stevenson*, 3 June 1823, 2 S. 358.

(*a*) *Attwood v. Griffin*, 1 Man. and Ry. 425.

(*b*) *Lowe v. Campbell*, 10 Dec. 1825, 4 S. 299; *Mackenzie v. Dott*, 18 July 1861, 23 S. 1310; *Mill v. Russel*, 16 Jan. 1810, F. C., H. 63.

(*c*) *Whitehead v. Henderson*, 19 Feb. 1836, 14 S. 544; *Edinburgh and Glasgow Bank v. Forbes*, 13 July 1858, 20 D. 1246. The case of *Bryce v. Dickson*, 16 Feb. 1810, F. C., where a bill was found null in consequence of an alteration in the date of payment, though it

had been made before the bill was signed, to correct an error, was questioned by Prof. Bell (1 Com. 392), and has not been followed.

(*d*) *Webber v. Maddocks*, 3 Camp. 1.

(*e*) *Kershaw v. Cox*, 3 Esp. 246.

(*f*) *Jacob v. Hart*, 2 Starkie, 45; *Brett v. Piccard*, Ryan and Moody, 37.

(*g*) *Laidlaw v. Park*, 3 Aug. 1774, M. 16941; *Fairweather v. Alison*, 12 Feb. 1817, F. C.; *Sutherland v. Morrison*, July 1823, 2 S. 442; *Kennedy v. Nash*, 1 Stark, 452; *Peacock v. Murrel*, 2 Stark, 558; *Upstone v. Marchant*, 2 B. and Cr. 10; *Johnston v. Garnett*, 2 Chitty, 122; *Leykarff v. Ashford*, 12 Moo. 281.

it to a payee (*a*), or indorsing it (*b*), the bill, though unaccepted, is issued. And if the drawer, after getting his bill accepted, retain it in his own hands for a time—for twenty days, for example (*c*)—the matter is no longer *in fieri*, and it is too late for making alterations. An accommodation-bill is held not to be issued so long as it remains in the hands of the parties to its concoction. A bill of this kind was proved to have been altered some time prior to its being discounted by the nominal acceptor; and though it could not be ascertained whether that had been done by him, or by the nominal drawer, or the indorsers, the banker who discounted it was held to have recourse against all of them (*d*).

‘When a document is produced which appears on the face of it to have been altered, it is the duty of the party suing on it to explain the circumstances under which such alteration has been made (*e*). He may be called upon to state the circumstances in a condescendence; and if the account he gives is unsatisfactory, the action may at once be dismissed (*f*). If the matter go to proof, it has been held in England, that the holder must explain the alteration by *extrinsic* evidence; and a jury has not been allowed to judge from the appearance of the bill, whether the alteration was simultaneous with the making or not (*g*). In Scotland the same rule has been generally acted upon. The holder is put to prove, clearly and distinctly, that the alteration was made before issue; or, if after issue, for the correction of an error, with the sanction of all parties (*h*). There is one case, however, where the Court of Session, judging from the appearance of a bill that the alteration must have been made before signature, sustained the action without putting the

Proof in cases
of alteration.

(*a*) *Walton v. Hastings*, 4 Camp. 223.

(*b*) *Outhwaite v. Luntly*, 4 Camp. 179.

(*c*) *Cardwell v. Martin*, 9 East, 190, 1 Camp. 79; *Bathe v. Taylor*, 15 East, 412.

(*d*) *Taylor v. M^r Whinnie*, 27 Feb. 1805, H. 51. See also *Downes v. Richardson*, 5 B. and A. 674 (overruling *Calvert v. Roberts*, 3 Camp. 343), to the same effect; and *Miller v. Royal Bank*, 21 May 1835, 13 S. 813; *Mackay v. Robertson*, 11 July 1832,

10 S. 813; *M^r Kenzie v. British Linen Co.*, 29 Nov. 1825, F. C.

(*e*) *Per Tindal* (C. J.), *Caius v. Tattersal*, 7 May 1841, 10 J. L. (C. P.) 187. See also *Bishop v. Chambre*, Mood and M. 116; *Johnson v. Marlborough*, 2 Stark, 363.

(*f*) *Allan v. Young*, 5 Mar. 1800, M. Apx. Bill, No. 10.

(*g*) *Knight v. Clements*, 1838, 7 L. J. (Q. B.) 144, 8 A. and E. 215.

(*h*) *Whitehead v. Henderson*, 19 Feb. 1836, 14 S. 544.

holder to the necessity of bringing proof (*a*). Where proof is required, the practice has been to allow it to be by parole; and an opinion has been given, that it ought not to be taken upon commission, but to be laid before a jury (*b*).'

SECTION V.

PECULIARITIES OF CHECKS ON BANKERS, BANK NOTES, DEPOSIT RECEIPTS, AND LETTERS OF CREDIT.

1. *Bank Checks.*

Bank checks.

Introductory.

'Drafts, or orders, for the payment of any sum of money to the bearer, or to order, on demand, are treated more favourably in regard to stamp duty than other bills. They are liable to a uniform duty of one penny, irrespective of their amount; and they have the further advantage, that the duty may be paid by using an adhesive stamp (*c*).

'The advantage given to bills of this class arose from the necessity of giving facilities to banking operations. Under the General Stamp Act of 1815, bank checks were exempted from duty; but, to prevent their being used in place of ordinary bills, the exemption was fettered by various conditions, as to their being drawn upon bankers resident within a certain distance, and as to their not being post-dated. In 1853, when the Stamp Acts were being altered in some respects, it seemed advisable to reduce the duty on all drafts to bearer, or order, on demand, from that on ordinary bills to a uniform rate of one penny (*d*). The former exemption from duty of drafts or orders drawn on bankers, was, however, continued; but being eventually found to occasion embarrassment, without sufficient corresponding advantage, the exemption was repealed in 1858 (*e*). There is thus a uniform duty of one penny on all drafts of this kind, whether they be drawn on a banker or not.

(*a*) *Henderson v. Hay*, 20 Feb. 1802, M. 17059. (The original tenor of the bill was nonsense, the date of payment being before the date of the bill.)

(*b*) *Armstrong v. Wilson*, 2 June 1846, 4 D. 1347.

(*c*) 16 & 17 Vict. c. 59; 21 Vict. c. 20; 23 & 24 Vict. c. 15. (Checks used by bankers for settling accounts between themselves are free from all duty by the last Act.)

(*d*) 16 & 17 Vict. c. 59.

(*e*) 21 Vict. c. 20.

‘ Under these provisions of the Stamp Acts two classes of drafts are in use. One of these, usually called a bank check, is made payable to A. B., or bearer, on demand; and the other, usually called a bank draft, is payable to A. B., or order, on demand. The two classes differ very slightly from each other, and are subject in general to the laws regulating bills of exchange. Some points, however, have been decided which have special application to them.

‘ The draft must be payable to bearer, or order, on demand. In Form. England, it has been held that an order payable to A. B. was liable to the ordinary duty on bills (a). In Scotland, where the words “or order” are always understood in bills, this decision might not be followed. The form, “Debit my account,” in use some years ago for the purpose of making bank drafts, was held to be a draft to bearer, on demand (b). It is doubtful whether the prohibition Date. against post-dating checks, in the General Stamp Act of 1815, is still in force. The clause does not apply to drafts payable to order on demand (c). It applies only to drafts payable to bearer on demand; but it is doubtful whether it can now be enforced, even in the case of these. Though a post-dated check cannot be said, when issued, to be “payable on demand,” it has been held that the amount of duty is to be gathered only from what appears on the face of the document (d), and, provided the holder wait till the post-date is past, there will be nothing in the instrument to show that it was not sufficiently stamped with a penny stamp.

‘ As already stated, the stamp duty is one penny, and may be Stamp. paid by using stamped paper, or an inland revenue adhesive stamp. If an adhesive stamp is used, the drawer must efface it by writing his initials, the sum, and the date on it (in figures if he pleases); and the bank paying the check, must write on it the word paid (e). An unstamped check is invalid, and the parties issuing or paying it are liable in certain penalties. Banks, however, have been specially authorized to affix stamps to orders issued on them unstamped; but the parties issuing them are not thereby relieved from the penalties (f).

(a) *Rex v. Yates*, 1 Ry. and M. 170.

(b) *Swan v. Bank of Scotland*, 8 Dec. 1841, 4 D. 210.

(c) *Whistler v. Foster*, 24 April 1863, 32 L. J. (C. P.) 161.

(d) *Williams v. Jarret*, 5 Band Ad. 32.

(e) 23 Vict. c. 15, §§ 9 and 12.

(f) 23 & 24 Vict. c. 111, § 18; 24 & 25 Vict. c. 91, § 33.

Consideration.

‘A bank check is an appropriation of so much of the drawer’s money in the banker’s hands to the use of the payee (*a*). The drawer of the check is to be considered as debtor to the payee (if he be named), and as standing towards him in the relation of maker of a promissory-note, or acceptor of a bill of exchange (*b*). Donations, it has been held in England, may be made by check, even on death-bed (*c*). The same doctrine has been laid down in Scotland (*d*); but doubts have recently been thrown upon it, in a case in which the law of England does not seem to have been adverted to (*e*).

Negotiability.

‘Bank checks and other drafts on demand may be transferred by indorsation or delivery, according to their tenor, like other bills (*f*).

Forged indorsement.

‘By the Act 16 & 17 Vict. c. 59, § 19, bankers are freed from the consequences of paying drafts to order on demand on forged indorsations. This immunity against the danger of forgery is granted to bankers alone.

Crossed checks.

‘If checks are crossed,—that is, have a double line drawn across them, either with or without the words “& Co.,”—the banker on whom they are drawn must not pay them unless they are presented to him by another banker (*g*). A banker who disregards the crossing has no recourse. A crossing once made, whether by the issuer or by a subsequent holder, becomes a material part of the check, and cannot be deleted; but if it be removed so skilfully as not to leave a plain trace, a banker paying it has recourse, unless he have acted in *mala fide*, or with negligence (*h*).

Bank check never overdue.

‘It cannot be laid down as law, that a party taking a check after any fixed time from its date, does so at his peril; and there is no ground for holding that a person taking an old check, takes it with no better title than the person from whom he got it (*i*).

(*a*) *Per Byles*, in *Keene v. Brand*, 29 L. J. (C. P.) 287.

(*b*) *Mullick v. Kadakisson*, 9 Moo. P. C. 69.

(*c*) *Bouts v. Ellis*, 1853, 22 L. J. (Ch.) 716; affirmed, 4 De G. M. and G. 249.

(*d*) *Steel’s Trs. v. Wemyss*, 18 Dec. 1793, M. 1409.

(*e*) *Barstow v. Inglis*, 5 Dec. 1857, 20 D. 230.

(*f*) *M’Gilchrist v. Arthur*, 16 Jan.

1794, M. 877; *Keene v. Brand*, 1 May 1860, 29 L. J. (C. P.) 287.

(*g*) 19 & 20 Vict. c. 25.

(*h*) 21 & 22 Vict. c. 79. On the history of crossed checks, the following cases may be consulted: *Bellamy v. Marjoribanks*, 6 Feb. 1852, 21 L. J. (Ex.) 70; *Carlton v. Ireland*, 11 Jan. 1856, 25 L. J. (Q. B.) 113; *Simmonds v. Taylor*, 10 May 1858, 27 L. J. (C. P.) 248.

(*i*) *Rothschild v. Corney*, 9 B. and C. 388.

‘Bank checks do not require to be presented within any specified time. If the drawer have lost nothing by the delay, he is bound to pay the check, though it be not presented for a year after it is due (a).’

When to be
presented for
payment.

‘If, however, the drawer have lost by the delay (as by the banker’s intervening insolvency, with the funds of the drawer in his possession), the payee loses recourse on the check, if he have taken an unreasonable time to present it. What in this case is an unreasonable time, has hitherto not been decided in Scotland. In England, it has been held that the payee has till the end of banking hours on the day next after receiving the check, to present it (b). If the place of payment be at a distance, the payee must send it off to his correspondent by the post of the day he received it, or that of the following morning; and his correspondent appears to have till the close of banking hours on the day after receiving it, to present (c). If the check be crossed, a payee, if he has time, must pay it into his own bankers on the day of getting it. A payee does not get longer time by crossing the cheque, and putting it into circulation in place of presenting it (d).’

‘Notice of dishonour must be given by the holder of a check in the same way as in other bills of exchange.’

Notice of
dishonour.

‘A banker is bound to pay his customers’ checks within a reasonable time after they are presented, and if he fails to do so, is liable to them in damages. Where a customer, who had on the evening before, L.69 in the bank, in the morning at eleven o’clock paid in L.40, and thereafter drew a check for L.87, which was dishonoured on being presented at three o’clock (the bank’s books not having been brought up), he was found entitled to damages (e). Where there are indorsations, it seems the banker has time to inquire into their genuineness (f). When a check is presented, it is a sufficient excuse to the banker for refusing to

Banker must
pay check on
demand.

- (a) *M’Gilchrist v. Arthur*, 16 Jan. 1794, M. 887; *Robinson v. Hawksford*, 29 May 1846, 15 L. J. (Q. B.) 377; *Laws v. Rund*, 8 Dec. 1857, 27 L. J. (C. P.) 76.
- (b) *Boddington v. Schlenker*, 1 May 1833, 2 L. J. (K. B.) 138; *Pocklington v. Silvester*, Chitty, 346.
- (c) *Rickford v. Ridge*, 2 Camp.
- 537; *Hare v. Henly*, 7 May 1861, 30 L. J. (C. P.) 302.
- (d) *Alexander v. Burchfield*, 7 June 1842, 11 L. J. (C. P.) 253.
- (e) *Marzetti v. Williams*, 1 B. and Ad. 415; *Rolin v. Steward*, 14 C. B. 595.
- (f) *Roberts v. Tucker*, 18 L. J. (Q. B.) 575.

pay, that he has applied the drawer's funds in his possession in paying bills made payable by the drawer at the bank; it being held, that if a person make bills payable at a bank, that gives authority to the banker to apply his funds in payment of them (a).

Recourse.

'A banker paying a check has no recourse against the payee; the presumption being, that the banker pays the money out of the drawer's cash in his hands (b). If the check be dishonoured, the holder has recourse against the drawer and indorsers, provided he have not failed to get payment by undue delay in presenting (c).

Whether summary diligence competent?

'The general opinion of the profession in Scotland seems to be that summary diligence is not competent on bank checks. That opinion was expressed in the former editions of this work, and is repeated in Mr Menzies' Lectures on Conveyancing (d). The question seems to have occurred just once in the Scottish courts, when its decision was avoided by turning the charge into a libel (e). In construing the word "bill" in the statute, which introduces a sort of modified summary diligence in England, it has been held to include bank checks; and these are accordingly, in England, on the same footing in this respect as other bills (f).

Bank notes.

2. Bank Notes.

Definition.

'Bank notes are promissory-notes issued by certain privileged bankers, entitling the bearer to payment of one or more pounds sterling on demand.'

History of legislation.

By the Act 37 Geo. III. c. 45, which was continued from time to time by other successive Acts, but was at last repealed by 59 Geo. III. c. 49, the Governor and Company of the Bank of England were restrained from paying any of their notes in *specie*, and authority was granted to stay legal proceedings brought against them to enforce such payment; and it was also provided, that payments in such notes should be deemed payments in cash, *if received as such*.

(a) *Kymer v. Laurie*, 18 L. J. (Q. B.) 218; *Roberts v. Tucker*, *ib.* p. 575.

(b) *Per* Justice Clerk, *Cumming v. Hendrie*, 20 July 1861, 23 D. 1368.

(c) *M'Donald v. Union Bank*, 29 March 1864; *Moule v. Brown*, 25 Dec. 1838, 7 L. J. (C. P.) 111.

(d) *Menzies on Conveyancing*, 3d ed., p. 385.

(e) *M'Gilchrist v. Arthur*, 16 Jan 1794, M. 877.

(f) *Eyre v. Waller*, 8 May 1860, 29 L. J. (Ex.) 246.

The same Act authorized collectors of taxes to receive Bank of England notes in payment; and it further provided against arresting a debtor to hold him to bail, unless on affidavit that he had not tendered payment of his debt in Bank of England notes. But this Act did not make such notes a legal tender. The Court of Common Pleas so decided (*a*), by finding that it was not a legal payment by a country bank for a L.5 note which they had issued, to give a Bank of England note for it instead of money. The same point was maintained in two trials (*b*), under certain English statutes, for exchanging guineas for Bank of England notes, at a higher rate than their legal value; it being pleaded, *inter alia*, in an argument on a special verdict, that the act charged did not fall under the statutes, inasmuch as these statutes related only to the taking of money for coin, etc., and not to the taking of bank notes. Judgment on the verdict was finally arrested, in conformity with the opinion of the Twelve Judges. It does not appear with certainty on which of the grounds pleaded their judgment was founded. But the plea now stated probably formed one ground; since, by an Act which passed immediately afterwards (*c*), taking or giving bank notes for coin, at a higher rate than the legal value of the coin, was declared to be a crime, as much as receiving or paying money had been before. This statute likewise enacted, that no person should be entitled to levy a debt by distress or poinding, if the debtor had tendered payment in Bank of England notes. But these notes were never ‘(till recently in England)’ declared by law to be a legal tender, which the creditor *must receive as money* (though he was prevented from enforcing payment otherwise if they were tendered); and since the 37 Geo. III. c. 45, and all the other Acts following on it, have been repealed, such notes are not in Scotland to be considered as money, unless received as such.

‘The issue of bank notes is now regulated by the English and Scotch Currency Acts. By the English Act, the power of issuing bank notes within the United Kingdom is confined to those bankers who were lawfully issuing them on the 6th of May 1844; and it is provided, that no bank note shall be issued or circulated in England

Currency Acts
now in force.

(*a*) *Grigby v. Oakes and Another*, 1 B. and P. 526.

(*b*) *The King v. Wright*, and the *King v. De Yonge*. *Vide Trial*, 1810.

(*c*) 51 Geo. III. c. 127.

for a less sum than five pounds (*a*). The Scotch Currency Act contains certain provisions as to the registration of the banks empowered to issue notes, and certain limitations as to the amount to be issued by them. By the same Act, all bank notes must be issued for one pound, or for some whole number of pounds, the insertion of fractional parts being prohibited (*b*).

Statutory
definition of
bank notes.

‘The provisions of these Acts having been found insufficient to prevent parties from evading their purpose, by issuing notes in all respects equivalent to bank notes, it was enacted in 1854, that all bills, drafts, or notes issued by any banker, or his agent, entitling, or intended to entitle, the holder, without indorsement, or without further indorsement than was thereon at the time of issuing, to the payment of money on demand, whether so expressed or not, and in whatever form, or by whomsoever made, should be deemed to be bank notes, within the meaning of the Currency Acts (*c*).

Whether bank
notes a legal
tender?

‘In Scotland, bank notes are not a legal tender, if gold is demanded at the time; all contracts to pay money being necessarily understood to mean to pay the standard money of the realm (*d*). Bank of England notes, though a legal tender in England (except at the offices of the bank) (*e*), are in Scotland on the same footing as other bank notes (*f*).

Nature of bank
notes. Not
cash,

‘Although bank notes are, in popular language, and in some legal respects, equivalent to cash, it is a confusion of ideas to describe them as money in contradistinction to bills of exchange. In many respects it is impossible, or at least unnecessary, to distinguish between them and gold; but it serves no useful purpose to endeavour to obliterate the distinction, and in many cases it leads to embarrassment. In Scotland, it should be recollected that all contracts to pay money are contracts to pay gold, and that if anything else is taken in its place, it is by consent of parties. Wherever money or cash is used in law in its popular sense, it includes bank notes (*g*). Thus a bequest of cash includes bank notes (*h*); and in construing

except of
consent,
or in popular
language.

(*a*) 7 & 8 Vict. c. 32.

(*b*) 8 & 9 Vict. c. 38.

(*c*) 17 & 18 Vict. c. 83, § 11.

(*d*) 56 Geo. III. c. 68.

(*e*) 3 & 4 Will. IV. c. 98, § 6.

(*f*) 8 & 9 Vict. c. 38, § 15. Silver money is a legal tender up to 40s. (56

Geo. III. c. 68, §§ 11, 12), and copper, it is said, up to 6d.

(*g*) *Miller v. Race*, 1 Bur. 452; *Richard v. Banks*, 13 East, 20; *Crawford v. Royal Bank*, 24 Feb. 1749, M. 875.

(*h*) *Heming v. Brock*, 1 Scho. and Lef. 318.

certain old Annuity Acts, the Court attached the same meaning to the words (a).

‘It was formerly held in England that bank notes, as being money (though the same decision would have followed from their being considered as bills), could not be taken in execution (b); but now, by special statute, they may (c). In Scotland the question has been raised, but not decided, whether bank notes may be poinded (d). By a statute, they may be taken by the Sheriff for Crown debts (e).’

Whether
poindable.

If a creditor receiving bank notes in payment wishes his debtor to be responsible for their amount, in case he does not obtain cash for them, he should require him to indorse them. By indorsation he will become liable, not only to the indorsee, but to any other person to whom the note may be transferred, if it be presented for payment without undue delay, and is not paid (f).

Recourse on
bank notes,
when indorsed.

‘If bank notes be taken in payment without being indorsed, the general rule will be with them, as with other unindorsed bills of exchange, that the holder will have no recourse (g). It would appear, however, that if the bank have failed at the time of payment, there will be recourse, if the holder give immediate notice to his former debtor that he still holds him liable (h). If he delay giving notice (for example, for seven days), he will lose his right of recourse (i). If the debtor know at the time of paying the notes that the bank have stopped, he will be liable in repayment, as having committed a fraud (k). The case of a bank failing immediately after the payment, and before there is time to present the notes, seems undistinguishable from that of the bank having failed before the payment (l); but if the payee retain the notes in his possession for two days without presenting them, he loses his recourse, though the bank

Recourse when
bank notes not
indorsed.

(a) *Wright v. Read*, 3 T. R. 554; *Cousins v. Thomson*, 6 T. R. 335; 17 Geo. III. c. 26.

(b) *Knight v. Criddle*, 1807, 9 East, 48.

(c) 1 & 2 Vict. c. 110, § 12.

(d) *Alexander v. M'Lay*, 10 Feb. 1826, 4 S. 439.

(e) 19 & 20 Vict. c. 56, § 32.

(f) Reprinted from former edition, p. 195.

(g) *Per Bramwell*, in *Lichfield Union*

v. Green, 1 H. and N. 884, 26 L. J. (Ex.) 140, where the various cases on this point are reviewed. Chitty, 354; Story on Bills, § 419.

(h) *Robson v. Oliver*, 28 May 1847, 16 L. J. (Q. B.) 437.

(i) *Camidge v. Allenby*, 6 B. and C. 381.

(k) See *Camidge v. Allenby*, *supra*.

(l) *Turner v. Stones*, 1 June 1843, 12 L. J. (Q. B.) 303.

should then fail (*a*). If he pay them into another bank, and obtain a deposit receipt for them, he cannot recover upon the receipt, if the bank fail immediately after it was granted, and he receive immediate notice of it (*b*).

‘Some opinions have been given in England, to the effect that where bank notes are not taken on account of a pre-existing debt (that is, it is presumed, in all ready money transactions), the payee has no recourse on the notes (*c*). The ground on which these opinions are rested, is, that the payee has chosen to take notes, when he might have insisted on gold, or have left the transaction alone.

‘If a creditor, having it in his power to demand gold, takes bank notes, he thereby discharges any cautioners he may have for his debt (*c*). On this principle, it would seem that if the holder of a bill of exchange take bank notes for it from the acceptor, he will have no recourse, on the failure of the bank, against the drawer and indorsers.

Summary
diligence.

‘Summary diligence is competent on bank notes, as upon other bills (*d*). The protest must be made at the office of the bank between the hours of nine in the morning and three in the afternoon.

Prescription.

‘Bank notes are exempted from the application of the sexennial prescription (*e*). There is no reason for believing that they are exempt from the long negative prescription of forty years, as the words of the Acts would include them, in the same way as other obligations (*f*).’

Deposit
receipts.

3. *Deposit Receipts.*

In England, it appears from the older decisions (*g*) to have been the practice for goldsmiths, who then acted as bankers, to give notes to their customers for the sums deposited with them, payable to the bearer on demand; and these were transferred in payment of debts like other promissory-notes. The statute of Anne, already men-

(*a*) The authorities are collected in Chitty, p. 354.

(*b*) *Timmins v. Gibbins*, 1852, 18 Q. B. 722.

(*c*) *Lichfield Union v. Green*, 1 H. and N. 884, 26 L. J. (Ex.) 140.

(*d*) 5 Geo. III. c. 49, §§ 4, 5, 6.

(*e*) 12 Geo. III. c. 72, § 39.

(*f*) 1469, c. 29; 1474, c. 55; 1617, c. 12.

(*g*) *Nicholson v. Sedgwick*, 1 Lord Raym. 180.

tioned (a), placed these, and all other promissory-notes, on the same footing with bills of exchange. They do not appear to have been much used in Scotland, where it is more customary for bankers to give receipts for the money deposited with them, which are payable on demand, and bear interest, at least in Scotland, whether stipulated or not. If they stipulate it, whether *in gremio* or in a memorandum, they are subjected to stamp duty as promissory-notes (b).

These receipts, like bills or notes, are transmissible by indorsation (c).

Whether
negotiable?

‘ This opinion, repeated from the last edition of this work, as to the negotiability of deposit receipts, does not appear to have strongly recommended itself. The point has not arisen purely for decision ; but the only judicial opinions which have been recorded are against the negotiability. Lords Cowan, Ardmillan, and Neaves have expressed adverse opinions ; while on the other side there is only a doubt expressed by the late Lord Justice-Clerk, Hope (d). The prevailing opinion seems to be, that an indorsement on a deposit receipt is a mere mandate to the indorsee to receive the money for the indorser’s behoof ; and that (as with other mandates) death would recall it, though the bank would be safe to pay, so long as it was in ignorance of the recall. The opinions, however, were delivered in a case which did not necessarily raise the point, and without any inquiry being made into the practice of merchants. As courts of law have invariably been at first reluctant to hold the privilege of negotiability to be conferred, it may be too soon to speculate what the decision may be when the question arises purely, and has therefore been thoroughly sifted.

‘ Several cases have occurred of alleged donation of deposit receipts, chiefly by aged, infirm, or dying persons. They seem all to have occurred between the executors of the alleged donor and the alleged donee. They are so much cases of special circumstances as to have

Donation by
deposit receipt.

(a) 3 & 4 Anne, c. 9.

(b) 55 Geo. III. c. 184, Sch. Part 1. Otherwise they are exempt from duty, 16 & 17 Vict. c. 59, Sch.

(c) This was held by the Court of Session (2d Division) in an unreported case, *Lindsay v. Robertson*, 1815, where a bank receipt having been indorsed by

a mark before two subscribing witnesses, the Court allowed the witnesses to be examined before answer, as to the genuineness of the indorsation. Session papers in my [author’s] possession.

(d) *Barstow v. Inglis*, 5 Dec. 1857, 20 D. 230.

little value as precedents; but the following general rules seem to have been established:—*Firstly*, that if the deposit receipt have been indorsed, the executors of the indorser have right to call upon the indorsee for an explanation of the circumstances of the indorsement; and that, if the latter allege that he received the receipt or its contents as a donation, he must support his allegation by satisfactory proof (*a*). *Secondly*, that if the deceased have taken a deposit receipt for his own money, jointly in the name of himself and another, or the survivor, the presumption will still be against donation (*b*). *Thirdly*, that if the deceased have taken the receipt in name of another party, and have delivered it either to him (*c*), or to another party for his behoof (*d*), the presumption will be in favour of donation, provided the executors can give no other satisfactory explanation of the transaction. If, however, in this third case, the receipt have not been delivered, it would rather appear that it would not be held as constituting a donation *mortis causa* (*e*).

Bank's obligation to pay deposit receipt.

'The bank is bound to pay the deposit receipt on demand, and if they delay, are liable in damages (*f*). They are safe to pay it to any person who presents it blank indorsed, or to any special indorsee, and are not concerned with questions between the person thus presenting it and the original payee (*g*). If they pay it on a forged indorsement, and the money is misappropriated, they will have it to repay (*h*). And when they have paid the money to a wrong person, it ought not to better their position that they have paid it without an indorsement at all (*i*). In this case they would seem to have a mere equitable title to the document, and to be therefore in no better position than the person from whom they got it.

(*a*) *Barstow v. Inglis*, 5 Dec. 1857, 20 D. 230; *M'Kellar v. Hunter*, 5 Mar. 1858, 20 D. 761; *Heron v. M'Geoch*, 13 Nov. 1851, 14 D. 25; *Henderson v. M'Culloch*, 12 June 1839, 1 D. 927; *Allan v. Kennedy*, 30 Jan. 1861, 23 D. 417; *Moffat v. Underwood*, 23 Nov. 1860, 23 D. 48.

(*b*) *Cruikshank v. Cruikshank*, 10 Dec. 1853, 16 D. 168.

(*c*) *Rose v. Kennedy*, 8 July 1863, 1 M'Ph. 1042.

(*d*) *British Linen Co. v. Martin*, 8 Mar. 1849, 11 D. 1004.

(*e*) *Cuthill v. Burns*, 20 Mar. 1862, 24 D. 849.

(*f*) *Mitchell v. Royal Bank*, 9 Mar. 1855, 17 D. 657.

(*g*) Opinions in *Barstow v. Inglis*, *ut supra*, note *a*.

(*h*) *Forbes' Executors v. Western Bank*, 8 Mar. 1854, 16 D. 807.

(*i*) *Stewart v. Central Bank*, 8 July 1859, 21 D. 1180.

4. *Letters of Credit.*

‘A letter of credit is a letter, usually addressed to a banker, requesting that the drafts of a person named may be honoured to a certain amount. It occasionally specifies a period after, or during which, the drafts are to be presented. These letters are of two kinds—special and general;—the former being addressed to some particular bank, and the latter being left without address, so that any one who has confidence in the drawer may give credit on it. Letters of credit.

‘Special letters of credit were formerly in daily use in this country; but since additional facilities have been given for transmitting money by checks, and bankers have been protected against the risk of forgery on drafts to order on demand, such letters have almost disappeared. General letters of credit appear never to have been much used in this country, and now appear to be chiefly used by continental travellers. Both kinds of letters are in frequent use in America, where the law on the subject appears consequently to be well developed (a).

‘Letters of credit are liable to a duty of one penny, which may be paid by the use of an adhesive stamp (b). General letters require to be stamped equally with special (c). Stamp.

‘Letters of credit are, properly speaking, not negotiable; but if they be indorsed for value, the indorsement makes an irrevocable mandate, entitling the indorsee to draw upon the letter. Thus, where a letter of credit was drawn on the 1st of a month, requesting A. to honour the drafts of B. to a certain amount on or after the 7th; and B., upon the 2d, indorsed the letter for full value in cash to C.; and then (before the 7th) became bankrupt; it was held, in a competition between B.’s trustee and C., that C. had right to operate upon the letter (d). Negotiability.

‘When a person pays money into a bank, and obtains from it a letter of credit addressed to a second bank in favour of a payee, the first bank is liable in damages to the person paying in, if the second Banker’s obligation to pay.

(a) A concise account of the American law on this subject will be found quoted at p. 113 of vol. iv. of Macqueen’s Appeals.

(b) 16 & 17 Vict. c. 59, schedule.

(c) *Waterston v. Edinburgh and Glasgow Bank*, 19 Feb. 1858, 20 D. 642.

(d) *Struthers v. Commercial Bank*, 27 Jan. 1842, 4 D. 461.

bank fail to make payment to the payee (*a*). And it is no defence for the first bank to plead, that they are discharged by the second bank having cashed the letter of credit on a forged draft (*b*); and that, even though the forgery should have been committed by some person in the employment of the transmitter (*c*), or of the payee (*d*).'

(*a*) *Orr v. Union Bank*, 7 Aug. 1854,
1 Macq. Ap. 513.

(*b*) *British Linen Co. v. Caledonian
Insurance Co.*, 18 Mar. 1861, 4 Macq.
Ap. 107.

(*c*) *British Linen v. Caledonian In-
surance Co.*, *ut supra*.

(*d*) *Orr v. Union Bank*, *ut supra*.

CHAPTER II.

WHO MAY BE PARTIES TO BILLS OR NOTES, AND IN WHAT MANNER THEY MAY BECOME BOUND?

THE subject of the present chapter shall be considered with special reference to bills and notes, though it will be necessary to explain, with regard to it, certain general principles applicable also to other obligations. The questions to be discussed are :

- I. Who may be parties to bills or notes? and,
- II. In what manner, or under what characters, they may become bound?

SECTION I.

WHO MAY BE PARTIES TO BILLS OR NOTES?

1. Consent being essential to bills and notes, no person can be a party to them if his signature is extorted (a). On this principle, persons destitute of reason, and pupils, cannot be bound, even to an onerous indorsee.

2. There are also certain rules for the benefit of persons who, though not incapable of consent, are yet unable to protect their own interests.

1. *Minors.*

Minors.

Minors (viz. males from fourteen, and females from twelve to twenty-one years), being presumed capable of consent, their obligations are not in general null *ipso jure*. Such nullity applies only

Minors having
curators
acting without
their consent.

(a) *Ante*, p. 62.

to deeds granted by a minor having curators, or living in family with his father, who is his administrator-in-law, without their consent (*a*); and these deeds may be voided at any time, even after majority, without a reduction. 'This rule, however, is subject to some modification; for if it be proved that the deed was plainly beneficial to the minor, and that circumstances have since occurred to render mutual restitution *in integrum* impossible, the deed will be sustained (*b*). Bills granted by a minor in favour of his curators are null (*c*).' But as the nullity is merely established for the minor's protection, it follows, that if neither he, nor any person for him, challenges the deed, no third person can do so.

Minors not
having cura-
tors, or acting
with their
consent.

On the other hand, deeds by a minor who has no curators, or with consent of his curators, are valid till formally reduced; and a reduction cannot be brought after four years from the granter's majority, or where there is no lesion. Minority and lesion, therefore, are not, *per se*, grounds for suspending a charge on a bill, but can only warrant a reduction (*d*); 'and an action of reduction must be actually brought within the four years, it being insufficient to state the objection by way of exception (*e*). The minor is, however, not limited to the *quadriennium utile*, where his curator and the creditor in the deed have connived to defraud him (*f*).' In a process of reduction, lesion will be presumed as to any bill or note by the minor, since it cannot be held that he has got value for it, unless that is proved; and, though he has granted the obligation for borrowed money, lesion will be presumed, unless the lender proves that the money was turned to his account (*g*).

Homologation
after majority.

This right of reduction will in general be barred by any act of homologation after the party's majority, although (*h*), where a young

(*a*) Erskine, i. 7, 34. *Bell v. Sutherland*, Jan. 1728, M. 8985; *Campbell v. Lord Lovat*, 15 Jan. 1731, M. 9035; *Thomson v. Pagan*, 3 July 1781, M. 8985; *Anderson v. Cation*, 28 Nov. 1828, 7 S. and D. 78; *Crawford v. Bennet*, 19 June 1827, 1 Wilson and Sh. Ap. Cas. 608.

(*b*) *Bruce v. Hamilton*, 23 Dec. 1854, 17 D. 265.

(*c*) *Anderson v. Cation*, 28 Nov. 1828, 7 S. 78.

(*d*) *Waddel v. Gibson*, 18 Jan. 1812, F. C.

(*e*) *Stewart v. Snodgrass*, 20 Dec. 1860, 23 D. 187.

(*f*) *Manuel v. Manuel*, 15 Jan. 1853, 15 D. 284.

(*g*) *Macdonald v. ———*, 16 July 1789, M. 9038; *Harkness v. Graham*, 20 June 1833, 11 S. 760.

(*h*) *Melvil v. Arnot*, 5 July 1782, M. 8998.

man had signed certain bills with his father when he was nineteen years old, and, fourteen days after majority, subscribed with his father a doqueted account, of which the bills formed articles, certifying its accuracy, the Court held that such a slight act of homologation following so soon after majority, and arising from a feeling of duty to a father, could not bar reduction, and therefore sustained the reduction. A promise made after majority to pay a bill or note subscribed during minority, will exclude the power of challenge (*a*). But such a promise, according to the law of Scotland, 'and of England (*b*),' must be in writing, although it would not probably require a separate stamp, as it does not form a distinct obligation, but refers to a previous obligation. A promise to pay *part*, or even a partial payment, will not validate the whole bill or note, though it would validate an informal contract on the ground of homologation; for the only thing necessary with an informal contract, is to prove the contract; whereas here, though proved, it is voidable entirely, on the ground of minority and lesion, and the power of rescinding it cannot be considered as renounced without a new and express promise (*c*).

There are important exceptions to the doctrine of restitution. Exceptions.
For instance, bills or notes, as well as other obligations, granted by a minor, whether with consent of his curators (if he has any) or not, are valid,

1. When the minor is in trade, as it will be presumed that he Trade bills.
has granted them with reference to his trade (*d*). But such a presumption will not hold when the bill is known to the creditor to be granted for a purpose not connected with the minor's trade; as where a minor, who is in business as a writer, accepts a bill as security for the price of goods sold to a third party (*e*). On the other hand, a bill, though granted under these circumstances, will probably be sustained in the hands of an onerous indorsee (*f*).

(*a*) *Harris v. Wall*, 1 Exch. 122; M. 9035; *Grieve v. Tail*, 14 July 1732, M. 9056; *Heddel v. Duncan*, 5 June 1810, F. C.; Ersk. i. 7, 38.

(*b*) 9 Geo. IV. c. 14, § 5.

(*c*) *Dilk v. Keighly*, 2 Esp. 481; *Thupp v. Fielder*, *ib.* 628.

(*d*) *Cowan v. Douglas*, cited by Forbes, 23; *Craig v. Grant*, 5 July 1732,

(*e*) *Dundas v. Allan*, 17 Jan. 1711, M. 9034.

(*f*) *Campbell v. Turner*, 24 Jan. 1822, 1 S. 266.

‘ The rule, that a minor who betakes himself to any business cannot be restored against deeds granted by him in relation to it, does not protect bills granted by the minor in every description of occupation on which he may please to embark. The rule is grounded on a consideration of his interest not to be excluded from any legitimate employment, or other reasonable or ordinary means of procuring and contributing to his livelihood; and if he enter on some quite different course of transactions, such as gambling in railway or other shares, the bills he may grant in it have no protection (a). Where a minor has a share of, or manages, the business of his father, and in the course of it grants a bill for a business debt, the creditor cannot make him personally liable, without showing that the proceeds went *in rem versum* (b).’

In England, bills granted by an infant are voidable, even though he is engaged in trade (c).

Bills for
necessaries.

2. As a minor, whether he has curators or not, may bind himself for necessary furnishings (d), a bill or note granted by him for the price of such furnishings will be effectual. This was partly the ground of decision in a case (e), where the Court sustained an acceptance granted by a young man of rank, aged fifteen, who held a commission in the army, for furnishings to him by a toyman, of articles such as young men of rank usually have. The same principles were adopted, though with a different result, in a case (f), where a haberdasher brought an action against a minor and his father for the amount of a dishonoured bill, drawn by the former on the latter, partly for money lent, and partly for goods furnished, to the minor. As the minor was apprenticed to a surgeon, who had orders to make him all necessary advances, the Court dismissed the action so far as regarded the money lent, but sustained it to the extent of necessary furnishings. In a later case (g), where a minor, on the eve of majority, had joined another party in accepting a bill

(a) *Dennistoun v. Mudie*, 31 Jan. 1850, 12 D. 613.

(b) *Wilson v. Laidlaw*, 29 June 1816, 6 Pat. Ap. 222; 2 Bell's Comm. 624; *M'Michael v. Barbour*, 17 Dec. 1840, 3 D. 279.

(c) *Williams v. Harrison*, 3 Salk 197; and *Williamson v. Watts*, 1 Camp. 552.

(d) *Inglis v. Sharp's Executors*, 5 Feb. 1631, M. 8941.

(e) *Johnston v. Maitland*, 20 Nov. 1782, Morr. 9036.

(f) *Scoffier v. Read*, 26 July 1783, Morr. 8936.

(g) *Wilkie v. Dunlop*, 28 Feb. 1834, 12 S. 506.

to an innkeeper for reasonable furnishings made by him to them during their residence at his inn on a shooting excursion (the innkeeper not being informed, and having no reason to believe, that he was minor), he was found liable, in a question with him and his guardians, for half the amount of the bill, his co-acceptor having paid the other half. In an analogous case in England (*a*), the term necessities was held to include what was usual and suitable in the minor's rank; and it was accordingly determined that a minor, who was a captain in the army, was liable for the price of a livery to his servant, as it was necessary that he should have a servant, although he was found not liable for the price of cockades furnished to some of the soldiers in his company.

It seems to have been held in England, that a minor cannot be bound by a bond stipulating interest, though it is alleged to be granted for necessities (*b*); and it has also been doubted, whether a *negotiable* bill or note granted by a minor for necessities will bind him even with reference to the original party; the objection being, that such a document might get into the hands of an onerous indorsee, who would not be bound to discuss the original consideration (*c*). On the other hand, it is said that a promissory-note for necessities would be valid, if made payable only to the person who supplied them (*d*). But such a distinction would not be admitted in Scotland. The general rule of our law is, that any obligation granted by a minor is null, when granted without consent of his curators, or reducible on the ground of lesion; and as this rule arises from the supposed incapacity of the obligant, it invalidates the obligation, whether in the hands of the original creditor, or even of an onerous indorsee. The plea that the obligation was granted for necessities, forms only an exception to this rule; and, therefore, it must be stated by an indorsee as well as by the original creditor, otherwise the obligation, even while in his hands, will be challengeable.

3. 'It has been said that when' a minor induces any party to take his obligation, by representing himself as major, his fraud will

Where fraud
on part of
minor.

(*a*) *Hands v. Slaney*, 8 T. R. 578.

552; *vide* note, 553, referring to *Trueman v. Hurst*, 1 T. R. 40; and *Bartlett v. Emery*, *ibid.* 42, note *a*.

(*b*) *Fisher v. Mowbray*, 8 East. 330.

(*c*) *Williamson v. Watts*, 1 Camp.

(*d*) 1 Camp. 553, note.

exclude him from setting aside the obligation ; though the result will be different if the creditor knew of his minority, and caused a statement that he was major to be inserted in the deed merely to render it valid (a). ‘The soundness of this opinion as to the liability of a fraudulent minor, which was founded mainly on the old maxim, *minoribus deceptis non decipientibus est subveniendum*, is now doubted (b). In England, an infant would not be civilly responsible, even though he had defrauded his creditor by representing himself as of age (c).’

Bill drawn during minority accepted after majority is good.

A bill, though drawn on a party while he is minor, will be a good obligation against him, if not accepted till majority (d). But it will be necessary that the acceptance should be dated, otherwise it will be presumed to be of the date when the bill was drawn. ‘In England, this point has been determined otherwise. The burden, it is held, lies on the acceptor to prove that he was minor at the time he accepted ; and proof that he was minor during some portion of the currency of the bill is not sufficient for this purpose (e). If he prove that he was a minor during the entire currency of the bill, it will be sufficient (f).’

Rights of other parties on bill to which minor is party.

The acceptor of a bill drawn by a minor cannot, it is believed, plead the drawer’s incapacity as a defence against an onerous indorsee, although his author, to whom the minor indorsed it to be discounted, should have misapplied the money, minority being a plea exclusive to the minor himself (g). The drawer or indorser of a bill accepted, or the indorser of a note granted by a minor, cannot found any plea on his minority, since such drawer or indorser

(a) Erskine, i. 7, 36 ; *Kennedy*, 23 Feb. 1665 ; *vide also Wilkie v. Dunlop*, 28 Feb. 1834, 12 S. 506.

(b) *Sutherland v. Morison*, 19 June 1825, 3 S. 449 ; *More’s Notes on Stair*, xlv.

(c) *Johnson v. Pye*, 1 Levinz, 169 ; *Cooper v. Witham*, *ibid.* 247 ; *Fairhurst v. Liverpool Adelphi Loan Association*, 31 Jan. 1854, 23 L. J. (Ex.) 163.

(d) *Stevens v. Jackson*, 4 Camp. 164.

(e) *Harrison v. Clifton*, 3 May 1849, 17 L. J. (Ex.) 233.

(f) *Roberts v. Bethel*, 16 Nov. 1852, 22 L. J. (C. P.) 69.

(g) In *Taylor v. Croker*, 4 Esp. 187, Lord Ellenborough held, that although the plea might have been good to the minor if the action had been brought against him, it could not void the right of an indorsee who brought the action, though he derived his title through the minor. *Vide also Jones v. Darch*, 4 Price, 300 ; also *Jeune v. Ward*, 2 Stark. 330 ; *Grey v. Cooper*, 3 Douglas, 65. In America it is well settled that a minor may indorse a bill or note payable to him, so as to give the indorsee

would be still liable under his draft or indorsation, although there had been no acceptance (a).

A minor may be payee or indorsee of a bill or note which is for his benefit. But if a debtor pays the amount to a minor having curators without a discharge from them, he will be liable in second payment, unless in so far as he can show that the money has been employed for the minor's advantage (b). In one case, where a father was in embarrassed circumstances, and not resident in Scotland, the Court held, that a person indebted to his children in a bond for L.500 was not bound to pay it even to him as their administrator, until he found security for its proper application (c). On the other hand, a minor without curators has, by law, the full administration of his affairs, and no Court can force him to name curators. It was therefore decided (d), that he was entitled, without curators, to receive and discharge half of a moveable succession which had been left to him. But his right so to discharge had been much doubted in a previous case (e); and, in a later case (f), where a minor without curators brought an action for payment of an heritable bond, the Court held, that the debtor was not obliged to pay it, although, on his agreeing to do so upon receiving security for his indemnification, they remitted to the Lord Ordinary to adjust the terms of the security. They appear to have distinguished in this case between principal sums and rents or interest, holding that minors might discharge the latter, as they might be presumed to be needed for their ordinary sustenance. But when debts, whether by bill or otherwise, are not clearly of this description, it would appear that the debtor is not bound to make payment to a minor unless there is a curator who can discharge him, as he might be liable to a challenge of the whole transaction, if the minor should squander the money. Even security for due application of the

Discharge by
minor.

a right against the prior parties. *Nightingale v. Withington*, 15 Mass. Rep. 272; Story, § 85.

(a) In *Haly v. Lane*, 2 Atk. 182, this doctrine is laid down as applicable, whether the bill or note has been accepted or granted by an infant or by a married woman. With regard to the case of married women, *vide post*.

(b) *Vide* Ersk. i. 7, 37, as to the inefficacy of payments made to minors.

(c) *Graham v. Duff*, 22 Feb. 1794, Morr. 16383.

(d) *Hochler v. Niddrick*, 31 Jan. 1772, Morr. 8975.

(e) *Hay v. Grant*, 22 Feb. 1749, Morr. 8973.

(f) *Kirkman v. Pym*, 1 Aug. 1782, Morr. 8977.

money does not appear to be sufficient, since any debtor may insist, before payment, that he shall have a full discharge.

2. Married Women.

Bills by married women are null,

A wife cannot in general bind herself by a bill or note, or any personal obligation, during the subsistence of the marriage, even with her husband's concurrence (*a*). On this ground it was held, in one case (*b*), that a bill drawn by a husband upon and accepted by his wife was null as to her; and that (the acceptance being void) it could not be the foundation of summary diligence against him as drawer, but must be recovered by ordinary action. 'It is immaterial that the consideration was good. Where a wife granted a renewal bill, in place of a bill granted by her prior to her marriage, it was held that the renewal bill was void (*c*). It would perhaps be more correct if it were said that the obligation undertaken when a married woman signed a bill was voidable rather than null, for the nullity must be pleaded; and if all the parties interested to plead the nullity are present, or called, and yet do not plead it, the bill is good (*d*).'

As the wife is *præposita negotiis domesticis*, she is entitled, in that character, to bind her husband (not herself (*e*)) for furnishings, so far as necessary for herself or the family, though her husband should have given her money to purchase them (*f*). But, 'as *præposita*, she does not obtain the right to grant bills; and' when money is borrowed by the wife in this character, the lender must show both that it was needed at the time, and expended on necessary furnishings. Further, though she can bind her husband for furnishings, she cannot make him liable for interest not otherwise due, by granting a bill or other obligation bearing interest (*g*). Such a

(*a*) *Vide* cases reported in Morr. 5957-80; also *Walker v. Home*, 4 Dec. 1827, 6 S. 204; *Thomson v. Cross*, 27 Nov. 1828, 7 S. 71; *Sym v. Gibb*, 26 Nov. 1825, 4. S. 226; *Sandilands v. Mercer*, 30 May 1833, 11 S. 665.

(*b*) *A v. B*, 17 Jan. 1736, Elchies, v. Bill, No. 12.

(*c*) *Balfour v. Ewing*, 5 Mar. 1831, 9 S. 558.

(*d*) *Thomson v. Stewart*, 11 Feb. 1840, 2 D. 564; *Mackenzie v. Fraser*, 18 May 1827, 5 S. 679.

(*e*) *Mitchelson v. Lady Cranstoun*, 12 Dec. 1780, M. 5886.

(*f*) *Erskine*, i. 6, 26.

(*g*) *Forrest v. The Earl of Sutherland*, 24 Nov. 1749, M. 478.

document, as to herself, is null, 'and, as to the husband, seems to place the creditor in no better position than if he had sued upon the debt for which it was granted.' Her *præpositura* lasts while she remains in family with her husband, unless he recalls it by inhibiting her.

If the wife has a separate property, exclusive of her husband's *jus mariti*, she may grant a security over it; but a personal obligation by her, though included in the same deed with the security—for instance, in an heritable bond—will be ineffectual (*a*). 'Even when the bill is granted by the wife for alimentary furnishings to the family, it is held not to form a ground for diligence against her separate estate (*b*).' The creditor may have a claim, after dissolution of the marriage, against her estate on such an obligation, in so far as the money advanced on the faith of it has been expended for her benefit (*c*). But there can be no action against her (*d*) during the subsistence of the marriage on such a claim, or even on claims contracted by her before the marriage, although there may upon obligations *ad factum præstandum* (*e*). 'Though a wife may bequeath a legacy, or make a donation *mortis causa*, it is doubtful whether she can, during marriage, grant an obligation where the time of performance is postponed till after the dissolution of the marriage. The balance of authority, however, seems to be in favour of the validity of such an obligation (*f*).'

even against
their separate
property.

A husband may, either expressly, or by acts inferring acquiescence, constitute his wife manager of a particular branch of business; and, in that case, all her contracts in such business will be binding, not on her, but on him (*g*). 'When a wife is in the habit of drawing, accepting, or indorsing bills for her husband, either in his own name or hers, any bill signed by her will be presumed to have been signed with her husband's authority (*h*). If a bill is addressed to a husband and accepted by his wife, and he promise to pay it

But wife, when
agent for
husband,

(*a*) *Menzies v. Gillespie's Creditors*, 8 Dec. 1761, M. 5974; *Watson v. Robertson*, 10 Dec. 1772, M. 5976.

(*b*) *Scott v. Scheniman*, 22 May 1818, H. 221.

(*c*) *Harvey v. Chessel's Trustees*, 21 Feb. 1791, M. 5980; *Gifford v. Rennie*, 1 Mar. 1853, 15 D. 451.

(*d*) *Strathmore v. Ewing*, 19 June 1832, 6 W. and S. 56.

(*e*) *Anderson v. Buchanan*, 27 July 1775, Morr. 6081.

(*f*) *Miller v. Milne's Trustees*, 3 Feb. 1859, 21 D. 377.

(*g*) *Erskine*, i. 6, 26.

(*h*) *Lord v. Hall*, 8 C. B. 627.

when presented, it will be presumed, in England, that he authorized her to accept (a). An indorsement by a wife, with the husband's authority, passes the interest in the note (b).'

or when living
separate,

When a wife has been separated from her husband by judicial, or even voluntary separation, receiving a fixed allowance from him, her husband is no longer bound for her debts, seeing her *præpositura* falls. On the other hand, as she has now a separate stock, her obligations are binding to the effect of attaching it (c). 'After a decree of separation *a mensa et thoro* has been pronounced at the wife's instance, she is capable of entering into obligations, is liable for injuries and wrongs, may sue and be sued, and may acquire and hold property as if she were not married. While the decree of separation subsists, the husband is not liable for any of her debts except when aliment has been awarded and not paid, in which case he is liable for necessary furnishings (d). If a husband desert his wife, she may apply to the Court of Session for an order to protect property she may acquire by industry or succeed to; and if the order be pronounced, it will have the same effect as a decree of separation *a mensa et thoro* (e).' The English courts 'of law' have adopted a different doctrine from that now stated, with regard to voluntary contracts of separation (f), holding, that as husband and wife are in law one person, no such contract of separation can exist between them, or change the relation established between them by law, so as to render the wife capable of personal obligations. Our law, on the other hand, has held, that though such contracts may be revoked by either of the parties agreeing to live with the other, they must, till then, receive full effect (g). Indeed, even the English courts of equity have determined, that when a wife is separated from her husband by a contract which vests a distinct property in trustees for her use, a promissory-note (h) or bill (i) accepted by her will be effectual against that property.

(a) *Lindus v. Bradwell*, 5 C. B. 583, 17 L. J. (C. P.) 121.

(b) *Prestwick v. Marshall*, 4 C. and P. 594; and *Cotes v. Davis*, 1 Camp. 485.

(c) *Robins v. Lady Southesk*, 6 July 1688, M. 5955.

(d) 24 & 25 Vict. c. 86, § 6.

(e) *Ibid.* §§ 1-5.

(f) *Marshall v. Rutton*, 8 T. R. 545.

(g) 2 Bell, 166-7.

(h) *Bullpin v. Clarke*, 17 Ves. jun. 365.

(i) *Stewart v. Kirkwall*, 3 Madd. 387; *Dawson v. Prime*, 17 Dec. 1857, 27 L. J. (Ch.) 169.

When the husband has left Scotland, the wife may bind herself for goods furnished to her in any trade (*a*), and likewise for a bill granted in such trade (*b*). 'This doctrine has been doubted (*c*), and is opposed to the English rule (*d*), but is now well settled, and has even been extended so as to cover a bill granted out of the course of such trade (*e*).’ Indeed, if the wife engages in trade, she will be liable for obligations in the course of it, whether her husband has left Scotland or not (*f*). The same doctrine appears to be established, both in the old and in the modern law of France (*g*).

or when engaged in trade, may grant bill.

But it does not seem that diligence could be used on such obligations against the wife's person during the marriage, though it may be used after its dissolution (*h*). The principle of a wife's exemption from personal diligence, even for debts affecting her separate stock, appears to be, that her husband is entitled to her society, and that therefore, to deprive him of it by imprisoning her, is to make him pay these debts, that he may release her. 'The principle does not apply where the husband has deserted the wife and left the country, leaving her to earn her own support by trade (*i*). In that case it is of advantage to the wife to be liable to personal diligence, as without such liability she might not get credit (*k*).’ This right 'of exemption also' ceases by attainder; and therefore a wife has been found liable for personal obligations contracted after her husband's attainder (*l*). But it is doubtful whether this rule would apply, as has been suggested (*m*), when the husband has merely been guilty of such desertion as would warrant a divorce, or has been transported as a criminal. In the last of these cases, his civil rights (and, among others, the right to his

Diligence against wife's person.

(*a*) *Russell v. Paterson*, 19 Mar. 1629, M. 5955; *Hay v. Corstorphin*, 23 June 1663, M. 5956.

(*b*) *Churnside v. Currie*, 11 July 1789, M. 6082.

(*c*) 2 Bell's Com. 167.

(*d*) Chitty, p. 15.

(*e*) *Orme v. Diffors*, 30 Nov. 1833, 12 S. 149.

(*f*) *Hog v. Little*, 9 Jan. 1611, Morr. 5955. ('This case hardly bears out the text.')

(*g*) Pothier, No. 28; Pardessus, No. 41; Nonguier, §§ 56, 57.

(*h*) *Primrose v. Watson*, 13 Jan. 1610, M. 5982; *Horne v. Moray*, 18 June 1667, M. 5983; *Libbis v. Orkney*, 12 Dec. 1609, M. 5982; *Neilson v. Arthur*, 23 Feb. 1672, M. 5984.

(*i*) *Orme v. Diffors*, 30 Nov. 1833, 12 S. 149.

(*k*) *Churnside v. Currie*, 11 July 1789, M. 6082.

(*l*) *Ball v. Countess of Southesk*, 29 June 1733, M. 6002.

(*m*) 2 Bell, 167, note 1.

wife's society) remain, except in so far as his sentence affects them. But its effect is merely temporary, while there is no security that the wife's imprisonment for debt, if permitted, would terminate at the same time with it, though the husband would be then entitled by law to her society. On the other hand, although the husband's desertion may entitle a wife to sue for a divorce, yet, if she does not, his right to her society is entire. It may be doubted, therefore, whether in these cases his right should be interfered with by allowing diligence against her person.

'If a decree of separation *a mensa et thoro* have been obtained, or an order for protection under the Conjugal Rights Act have been pronounced, at the wife's instance, it would appear that the wife, having power to contract as an unmarried woman, would be liable for all the consequences of the contract in the same way, and would therefore be liable to personal diligence so long as the decree or order of protection subsisted (a).'

Bills granted
by wife before
her marriage.

A husband is liable, so long as the marriage subsists, for bills or notes granted by his wife, even before marriage (b); but he would not be liable to summary diligence on them, seeing he is not an obligant *ex facie* of them.

Bills in favour
of a wife belong
to husband,

On the other hand, he is entitled to sue for bills or notes granted in her favour before marriage (c). And if a bill or note should be granted or indorsed to a wife after marriage, the right to it would accrue to the husband, 'unless it related to a debt not falling under the *jus mariti* (d).' In one case (e), a charge by a wife alone on such a bill was suspended, and the nullity of the charge was held not to be remedied even by the husband's concurrence in the suspension. 'It would now be held that the husband's after-concurrence validated the previous proceedings (f). The concurrence of the husband is necessary even where the *jus mariti* is

(a) 24 & 25 Vict. c. 86.

(b) *Lesly v. Nicholson*, Jan. 1725, M. 5766. An attempt was here made to show that bills ought to be considered heritable as to the husband, under the Act 1661, c. 32, because interest was due on them.

(c) *Gilhagie v. Orr*, 13 Dec. 1738, Morr. 1421.

(d) *Mungal v. Calder*, 11 Jan. 1750, M. 5771; *Gow v. Lang*, 11 Dec. 1807, H. 220; *Nisbet v. Rennie*, 18 Dec. 1818, H. 221.

(e) *Jeffrey v. Matheson*, 28 June 1826, 4 S. 765.

(f) *Borthwick v. Grant*, 17 Feb. 1829, 7 S. 420.

excluded (a).’ But the husband is not entitled to protest such bills or notes in his own name, and then to use summary diligence, as that privilege is confined to the payee specified in the bill or note, or his order; or, according to the Act 12 Geo. III. c. 72, to the drawer, payee, or indorsee (b). It may perhaps be competent to protest the bill or note in name of the wife, as creditor *ex facie*, or in name of the husband and wife jointly, and to record the instrument of protest, and then, on producing evidence of the marriage, as a legal assignation of the registered protest to the husband, to obtain warrant for diligence in the husband’s name. But this point has never been directly decided (c). ‘When the husband proceeds by ordinary action, he may sue in his own name (d).’

It has been held in England (and the doctrine seems to be applicable in Scotland), that as the husband becomes, by marriage, assignee to all his wife’s personal claims, including bills or notes, he alone is entitled to indorse them, though taken payable to the wife before her marriage (e). The converse of this doctrine has been decided, viz., that an indorsement by a married woman of a note payable to her, or order, after marriage, was null, as the right to it vested in her husband (f). But it has been held (g), that the indorsement of a bill by the wife, with the husband’s consent, and that of the acceptor, effectually transfers the bill, and gives action on it against the acceptor.

and can be
indorsed only
by him.

‘After some conflict of decisions, it has been determined in England, that if a person knowingly accept a bill drawn by a married woman, he cannot dispute her right to indorse it, and will be obliged to pay the contents of the bill to her indorsee, even though he should run the risk of having to pay them over again to her husband (h). This proceeds on the principle that the acceptor is barred by his ac-

(a) *Wight v. Dewar*, 9 Mar. 1827, 5 S. 549.

(b) *Smith v. Selby*, 10 July 1828, 7 S. 885.

(c) See *Smith v. Selby*, *supra*.

(d) *Gilhagie v. Orr*, *supra*; *Macdougall v. Wilson*, 20 Feb. 1858, 20 D. 658; *Mason v. Morgan*, 6 Dec. 1834, 4 L. J. (K. B.) 12; *M’Neilage v. Holway*, 1 B. and A. 218.

(e) *Connor v. Martin*, cited in *Rawlinson v. Stone*, 3 Wils. 5.

(f) *Binny v. Smith*, 26 Jan. 1836, 14 S. 355; *Barlow v. Bishop*, 1 East. 432, 3 Esp. 266.

(g) *Prestwick v. Marshall*, 4 C. and Pay. 594.

(h) *Smith v. Marsack*, 10 Nov. 1848, 18 L. J. (C. P.) 65.

ceptance from pleading the wife's incapacity to indorse. In Scotland the opposite rule has been established. It is held, that where the holder of the bill knows that the drawer is married, it is his duty to get the husband's indorsement; and that, if he knowingly takes his property without his consent, he has no action against the acceptor (*a*). The Scottish doctrine, so long as its application is limited to the case of holders who know of the indorser's marriage, and is not extended to defeat the rights of innocent holders, seems the more equitable.'

3. *Interdicted Persons.*

Interdicted
persons.

As interdiction affects only heritable property, the interdicted person may, without consent of his interdictors, grant bills or notes which will be binding against his person or his moveable property; but not so as to affect his heritage, unless with 'the interdictor's' consent, or unless it can be shown that full value was given (*b*).

In a recent case (*c*), a suspension was passed on caution, at the instance of the acceptor of a bill and his interdictors, against an indorsee, on the allegation that the bill had been accepted blank, after publication of the interdiction, and indorsed without value, though the indorsee pleaded onerosity and *bona fides*. The suspension must have been intended merely to prevent the constitution of the debt against the acceptor's heritable estate. 'An action of reduction of the bill was afterwards brought, in which, on its appearing that the bill had been accepted before the interdiction, it was found that it was not reducible (*d*).'

4. *Corporations.*

Corporations.

It seems to be doubtful in England, whether corporations can contract except by deeds under their seal, and whether, therefore, they can grant bills or notes, which are writings not under seal,

(*a*) *Binny v. Smith*, 26 Jan. 1836, 14 S. 355.

(*b*) *Vide* Ersk. i. 7, 57-8; *Kyle*, 14 Dec. 1826, 5 S. 128.

(*c*) *Scott v. M'Nillidge*, 14 Feb. 1835, 13 S. 469.

(*d*) *Scott v. Dunn*, 13 May 1837, 15 S. 924.

unless permitted to do so by special statute (a). In Scotland they may grant bills or notes, as well as other obligations, by the subscription of their office-bearers for the time. These officers do not bind themselves personally, but the corporation. Any action, therefore, or diligence for payment is not directed against them after their office has expired, but against the office-bearers for the time, though they have not granted the obligations; and even they, not being personally liable, are entitled to absolver on making over the funds of the corporation (b).

5. *Joint Stock Companies.*

‘Joint stock companies are now regulated by the Act 25 & 26 Vict. c. 89, which repeals all former acts, except as to companies previously registered under them. Under that Act, all companies of not less than seven persons in number may be registered; and all companies, for banking purposes, exceeding ten in number, or for other purposes not exceeding twenty, must be registered. The liability of the shareholders may be either limited or unlimited, as the contract may provide; but if it be limited, that word must form the last word of the company’s designation. The regulation as to the negotiation of bills and notes by such companies is very simple. The 47th section of the Act, that “a promissory-note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company, by any person acting under the authority of the company.” Under this Act, a party taking a bill from a joint stock company must see, *firstly*, that the person signing on behalf of the company has their authority for

Joint stock companies.

(a) *V. Bayley*, 67–8, who is favourable to their common law right of granting bills or notes, at least in some cases, and *Chitty*, 9. *Vide* also cases cited by both authors, particularly *Slark v. Highgate Archway Company*, 5 Taunt. 794; and *Broughton v. The*

Manchester Waterworks Company, 3 B. and A. 1.

(b) *Bowie v. Wilson*, 7 Feb. 1695; *Cleland v. Magistrates of Pittenweem*, 10 July 1752; *Livy v. Mudie*, 6 Aug. 1774; *Anderson v. Morton*, 18 Nov. 1779, M. 2510; *Menzies on Conveyancing*, 209.

what he is doing ; and, *secondly*, that the bill is drawn in name of, or by, or on behalf of, or on account of the company. The second of these provisions is so simple as to require no observation. On the first it may be observed, that it would appear that the authority must be contained in a written resolution by the company, as that is the only form in which the will of the company can be expressed. Therefore the authority of the directors will not be sufficient, unless the terms of their appointment confer the power on them (*a*). It would not seem to be necessary that the authority should be conferred on directors in express terms ; for if the nature of the duties assigned to them fairly imply that they were to draw bills in the course of executing them, it would be fair that those bills should bind the company. In deciding on all such bills, the Courts will construe them so that, if possible, the company may be bound (*b*). If the company is not bound, the person professing to sign for them necessarily binds himself (*c*).'

SECTION II.

UNDER WHAT CHARACTERS OBLIGANTS MAY BECOME PARTIES TO BILLS OR NOTES.

Characters in which parties may become obligants.

The different characters of drawer, indorser, or acceptor of bills or notes, under which a person may become a party to them, have been already described.

No person can, in general, become bound as a party to a bill or note, unless *his name*, or that of the firm to which he belongs, appears on some part of it (*d*). 'It was at one time held (contrary to the law-merchant) that a party might, under certain circumstances, render himself liable as an acceptor without subscription.

(*a*) *Bull v. Morrell*, 20 Dec. 1840, 10 L. J. (Q. B.) 52 ; *Bramah v. Roberts*, 1837, 6 L. J. (C. P.) 346.

(*b*) *Lindus v. Melrose*, 23 Feb. 1858, 27 L. J. (Ex.) 326 ; *Aggs v. Nicholson*, 10 June 1856, 25 L. J. (Ex.) 348.

(*c*) *Penrose v. Martyn*, 1 June 1858, 28 L. J. (Q. B.) 28, where the secre-

tary was made personally liable because he had omitted the word "limited" in the company's name ; and other cases cited *infra*, pp. 155, 160.

(*d*) *Fenn v. Harrison*, 3 T. R. 760 ; *Siffkin v. Walker*, 2 Camp. 308 ; *Emly v. Lye*, 15 East. 7 ; *Harrisons v. Chippendale*, 9 Dec. 1794, Morr. 1620.

That error was corrected by the Mercantile Amendment Acts (a); and now no person is liable on a bill which he has not signed, unless he have taken upon himself, by marriage, mandate, copartnery, or otherwise, the liability of some other person who has signed. When a party signs a bill with his simple name, the necessary presumption is, that he personally binds himself, and himself only (b); and if he wishes to affect his liability by the circumstance of his being executor, trustee, agent, partner, or joint adventurer, the particular character in which he signs must appear on the face of the bill. In this section we propose to consider how the possession of any of these various characters may affect the rights and liabilities of the parties.'

1. *Executors and Trustees.*

A person may become a party to a bill or note as executor for a party deceased. An executor acquires right to all bills or notes that belonged to the deceased, and is entitled to endorse them (c). 'In recovering bills due to the deceased, he is bound to be diligent; and if he fail in this respect, is personally liable to the estate for their amount. It is not enough that he press for payment; for it was held, in a case where the deceased had actually lent the money on the bill as an investment, and where the executor had refrained from suing for payment merely because he believed that doing so would endanger the whole fund, that he was nevertheless liable on the ultimate bankruptcy of the acceptors (d). After this decision no executor is safe who does not collect the bills due to the deceased in the shortest possible time that the law will allow. The receipt of a confirmed executor is sufficient to protect the debtor, even though it should afterwards appear that the testament under which he acted was forged (e). If the executor indorse or grant bills, even *qua* executor, that is a guarantee that he is possessed of assets to

(a) 19 & 20 Vict. c. 60, § 11; 19 & 20 Vict. c. 97, § 6. 3 Wils. 1; *King v. Thom*, 1 T. R. 487.

(b) *Telfer v. Wood*, 26 May 1824, 2 S. Ap. 220. (d) *Forman v. Burns*, 2 Feb. 1853, 15 D. 362.

(c) *Fair v. Cranstoun*, 11 July 1801, M. 1677; *Rawlinson v. Stone*, (e) *Allen v. Dundas*, 3 T. R. 125.

meet it, and renders him personally liable for the payment (a). The executor may fill up and sue on blank bills found in the deceased's repositories (b); but he is not bound or entitled to deliver a bill found there to a person whose name has been indorsed on it by the deceased (c). If the deceased have parted with the property of a bill for a valuable consideration, but have neglected to indorse it, the executor may be compelled to do so to complete the holder's title, but will be entitled in that event to add words protecting himself from personal liability (d).'

For the reasons which have been stated (e) with regard to the case of a husband acquiring bills or notes vested in his wife before marriage, it seems doubtful whether the executor of a person deceased could protest such bills or notes in his own name, to the effect of raising summary diligence, though he may do so to the effect of preserving recourse, and of founding a claim in an ordinary action. But if such bills or notes have been protested by the creditor during his life, a confirmed executor may, on producing his confirmation, get the instrument of protest registered, under the Act 1693, c. 15, so as to raise summary diligence thereon, as the original creditor might have done while alive.

Trustees.

'Trustees, whether under family settlements (f), for charitable purposes (g), or for creditors (h), like executors, render themselves personally liable when they sign bills, even when they do so under their designation of trustee, and strictly for the trust purposes. A bill may be properly enough addressed to a trust, by naming two or three of the trustees, and then describing the others under the name of the trust; and if such a bill be intimated, it will operate as an

(a) *Eaton v. Macgregor's Exrs.*, 25 May 1837, 15 S. 1012; *King v. Thom*, 1 T. R. 487; *Child v. Monins*, 2 B. and B. 460. See also *Aspinall v. Wake*, 6 June 1833, 2 L. J. (C. P.) 227, where it was held that the word "executors" in a bill might be rejected as surplusage, on the ground that it did not affect the liability.

(b) *M'Donald's Trs. v. Rankin*, 13 June 1817, F. C.; *Ogilvie v. Moss*, 28 June 1804, M. Apx. Bill., No. 17; *Fair v. Cranstoun*, 11 July 1801, M. 1677, H. 46.

(c) *Bromage v. Lloyd*, 1847, 1 Exch. 32.

(d) *Watkins v. Maule*, 2 Jac. and W. 237; *ex parte Mowbray*, 1 Jac. and W. 448; *ex parte Rhodes*, 3 M. and A. 217.

(e) *Ante*, p. 141.

(f) *Thomson v. M'Lachlan*, 24 June 1829, 7 S. 787.

(g) *Ross v. Young*, 14 Jan. 1831, 9 S. 275.

(h) *Murray v. Campbell*, 28 Nov. 1827, 6 S. 147.

assignment of the trust funds (a). But no bill will bind the trust estate, unless accepted either by a quorum of the trustees, or by some one duly authorized by such quorum (b) ; and as it is no part of the duty of trustees to pledge the credit of the trust for any but the trust purposes, a person taking a bill signed by trustees, would require to satisfy himself that it had been granted for a trust debt, as otherwise he might find himself without recourse against the trust funds (c).'

2. Agents.

An individual may become a party to a bill or note, not only by his own deed, but by that of his agent acting under his authority ; and, in this case, he is said to draw, indorse, or accept by procuration. As such agency implies personal trust by the constituent in his agent, the latter cannot devolve the trust thus reposed in him on another, unless he has powers to that effect.

Procuration or agency.

Parties whom the law deems incapable of protecting their own interests, as minors, or married women, may yet subscribe bills or notes as agents for others, since persons are entitled to entrust their interests to whomsoever they choose (d). But pupils, or those destitute of reason, must be excepted, because they cannot accept or exercise any office which requires consent. It has been said, that parties whose own rights are out of the protection of the law, as persons attainted or outlawed, or alien enemies, may yet contract by authority of others (e).

Who may be agents.

With regard to the manner in which a procuration to sign bills or notes is constituted, it may be,

How procuration constituted :—

1st, By a special written mandate. It was once held, that a formal power of attorney was in general necessary, though capable of being supplied by acts and deeds that inferred mandate (f). In

1. By special mandate.

(a) *Watt's Trs. v. Pinkney*, 21 Dec. 1853, 16 D. 279.

(b) In *Jenkins v. Morris*, 16 M. and W. 877, where one trustee having authority to accept a bill for his co-trustees, signed his name, without more, it was held a valid acceptance for himself and the others. See *Murray v. Campbell*, p. 146, note h.

(c) The general law relating to the liabilities incurred by trustees to cre-

ditors of the trust estate, will be found well stated in M'Laren on Trusts, cap. xxiii.

(d) *Lindus v. Bradwell*, 29 Jan. 1848, 17 L. J. (C. P.) 121 ; *Lord v. Hall*, 6 Dec. 1849, 19 L. J. (C. P.) 47 ; *M'Michael v. Barbour*, 17 Dec. 1840, 3 D. 279.

(e) *Chitty*, 20.

(f) *Marius*, 104 ; *Beawes*, No. 86, r. Bills of Exchange.

one case, indeed, a special mandate seems to have been held universally indispensable (*a*) ; but the House of Lords, on an appeal, were of opinion that procuration might be inferred without such a mandate.

2. Verbally.

Procuration may therefore be constituted, *2d*, In England by a verbal mandate ; ‘ it being held that, if a bill is indorsed for a person’s behoof by his verbal order, it is the same as if he had indorsed it himself’ (*b*). It may be doubted whether a mandate, without writing, would be effectual in Scotland.

3. By facts and circumstances.

3d, Procuration may be constituted by acts of the principal, which imply his authority to the agent to subscribe for him (*c*), such as his approving of bills drawn on his account, during his absence, which will sanction such bills, if drawn afterwards by the same party (*d*), or by paying bills drawn with his name as drawer, by a person connected with him in trade (*e*), or by allowing a person to sign instruments habitually for him, or in his name, though his approbation should not be directly proved (*f*). ‘ If, again, a person entrust the whole management of his business to another, he will be liable for bills which the manager has drawn in the ordinary course of conducting the business (*g*). But the facts and circumstances from which the authority is to be inferred must be specially averred. It will not do, for example, to say generally, that the defender had paid previous bills, without giving instances, or to rely exclusively on the custom of trade, as authorizing the particular acceptance (*h*). The facts must also be clearly proved (*i*) ; and if it appear at the trial that they were altogether unknown to the drawer, and that he had not taken the bills on the faith of them, he will not succeed (*k*).’ In a case (*l*) where a daughter had signed

(*a*) *Davison v. Robison*, 3 Dow, 218.

(*b*) *Per Holt*, 12 Mod. 564 ; *per Ellenborough*, 3 Dow, 229 ; *Porthouse v. Parker*, 1 Camp. 82 ; *Harrison v. Jackson*, 7 T. R. 209.

(*c*) *Davidson v. Robertson*, 4 July 1815, 3 Dow, 218.

(*d*) *Beawes*, No. 86, Mar. 105.

(*e*) *Barber v. Gingell*, 3 Esp. 60 ; *Helmsley v. Loder*, 2 Camp. 450 ; *Prescott v. Flinn*, 2 M. and Scott, 19 ; *Cash v. Taylor*, 8 L. J. 262.

(*f*) *Haughton v. Eurbank*, 4 Camp. 188 ; *Neal v. Irving*, 1 Esp. 61.

(*g*) *Turnbull v. Mackie*, 26 Feb. 1822, 1 S. 393.

(*h*) *Swinburne v. Western Bank*, 13 June 1856, 18 D. 1025 ; *Jackson v. Williamson*, 9 Dec. 1825, 4 S. 293.

(*i*) *Davidson v. Stanley*, 2 M. and G. 721.

(*k*) *Cash v. Taylor*, 8 L. J. (O. S.) K. B. 262.

(*l*) *Lowson v. Matthew*, 18 Nov. 1823, 2 S. 502.

her mother's name to a bill without being authorized, her mother not being in trade, and the daughter having only signed for her about six times before, by special authority, the Court suspended a charge against the mother on the bill. 'The fact of the alleged principal receiving the proceeds of the bill is insufficient, of itself, to make him a party to it (a).'

4th, Procuration may further be conferred by an express power of factory (b). 'The power of granting bills must in this case either be conferred in express terms, or granted in terms which leave no doubt as to its being implied; and any words, however comprehensive, which are annexed to a power of attorney, must be construed with reference to the specific purpose for which it was executed (c). Thus, a power of attorney to receive money due to the mandant "and transact all business," is not a power to indorse bills (d); and if an executor grant a power of attorney to another to act for him as executor, that does not authorize the agent to grant bills, because the power is to bind the principal as executor only, and not personally (e). The power is not to be inferred. A commission-agent is not entitled to draw bills against his sales *per procuration* of his principal; though, if the principal have received the proceeds of the bill, and there be a custom of trade to warrant the drawing, he may be liable (f). But even where there is usage to support the act, a mere power to receive and discharge money due to the constituent does not authorize the attorney to indorse on his own account bills which have been given in payment (g). 'A factor for a minor has no authority to uplift bills made payable to the curator, even when he is custodier of the bill and has been in the practice of drawing the interest (h).

4. By power of factory.

'Subsequent assent to the actings of a person as agent will put these actings in the same position as if the agent had had authority

Subsequent assent.

(a) *Telfer v. Wood*, 5 Feb. 1822, 2 S. Ap. 219; *North British Bank v. Ayrshire Iron Co.*, 29 June 1853, 15 D. 782; *Woodrow v. Wright*, 15 Nov. 1861, 24 D. 31; *Kilgour v. Finlayson*, 1 H. Bl. 155.

(b) *Clapton v. Macintosh*, 20 Feb. 1700, *Forbes on Bills*, 12.

(c) *Erskine*, 3, 3, 39.

(d) *Hay v. Goldsmith*, 2 Smith's Rep. 79; *Murray v. East India Co.*, 5 B. and A. 204.

(e) *Gardner v. Baillie*, 6 T. R. 591.

(f) *Anderson v. Buck*, 3 June 1841, 3 D. 975.

(g) *Hog v. Smith*, 1 Taunt. 347.

(h) *Clyde Trs. v. Duncan*, H. L. 17 Mar. 1853, 15 D. 36.

from the beginning (a). If, for example, the alleged principal deliver or indorse to a third party bills drawn by the alleged agent, that will remove any defect in the agent's original right (b). But the act from which assent is to be inferred must be unequivocal (c). A mere verbal assent, given without a consideration, is insufficient (d).'

How procuration is terminated.

Mandates terminate, in general, by the death of the mandant or mandatory; by the insanity of the latter; by revocation; by renunciation; or by the sequestration of the mandant, which vests his estate, and all the rights connected with it, in his creditors. The mandatory's bankruptcy does not appear to be inconsistent with the continuance of his mandate.

When notice of termination required. General mandate.

But the rights of third parties are differently affected by its termination, according as they have or have not been led to believe in its continuance. Any person allowing another to exercise a general management of his affairs, whether by express or tacit mandate, contracts thereby an implied obligation to the public, that the mandate shall be held *quoad* him as continued, until its termination becomes notorious, or has been made known to the party contracting. In this view, as the mandant's death and bankruptcy are notorious events, the presumption is, that every person is aware of them; and, therefore, contracts made subsequently with the mandatory, or acts performed by him, will not be valid, unless (e) it is proved by the parties making them that these events were unknown to the mandatory or the contracting party, and could not have been known by ordinary diligence. Further, if a factor has advanced money, before his constituent's death (f) or bankruptcy, on the faith of goods consigned to him, he will be entitled, even after these events, to sell the goods for his indemnification (g). But, on the principles which have been now mentioned, there is no

(a) *Per Holt*, *Ward v. Evans*, 2 Raym. 928; *Boulton v. Hillesden*, Comb. 450; *per Buller*, 2 T. R. 189.

(b) *Miller v. Leslie*, 22 Jan. 1831, 9 S. 328; *Jones v. Turnour*, 4 C. and P. 204.

(c) *Woodrow v. Wright*, 15 Nov. 1861, 24 D. 31.

(d) *Fenn v. Harrison*, 4 T. R. 177.

(e) *Campbell v. Anderson*, 1 May 1829, 3 W. and S. Ap. 384.

(f) *Vide Hammond v. Barclay*, 2 East. 227, where a factor was found entitled, notwithstanding his constituent's death, to take credit in an accounting with his executors, for payments made on the faith of the mandate.

(g) *Scott's Trs. v. Stewart*, 17 Dec. 1814, F. C.

ground to presume that the revocation or renunciation of a general mandate (neither of them being notorious) are known to third parties; and, therefore, the contracts of such parties with a general agent will be effectual, unless it is proved that they knew, or ought to have known, of the renunciation or recall (*a*). For instance, a servant who had power to draw bills in his master's name, may bind him by bills so drawn after his dismissal, if the party taking them had not time to know of it (*b*). The kind of intimation which is necessary to exclude this risk shall be afterwards considered with reference to the dissolution of partnership. In the event of the mandant's supervening insanity, which is not in itself notorious, it seems to follow, from the mandant's implied contract with the public, that transactions made, even after it, with the mandatory, shall stand, unless with reference to parties who knew of the insanity (*c*).

It has been said (*d*) that limited mandates (which expire, in general, from the causes already mentioned, or by performance of the business for which they were granted) "are not, like general powers, capable of extension by mere inference and *bona fides*." But the mandant, by suffering such a mandatory to act, enters into the same implied contract with the public as in a general mandate, viz. that the mandate shall continue till its termination is made known; and therefore, though it be recalled, or have ceased, all acts falling within the scope of it will be good as to third parties, unless its revocation is notorious, or has been intimated to them. The case of a limited partnership, to be afterwards noticed, which entitles third parties, after its dissolution, to rely on contracts within the scope of

Limited
mandate.

(*a*) *Vide* Opinion of Buller, J., in *Salt v. Field*, 5 T. R. 215, who says, that, in such a case, the principal cannot void the *bona fide* acts of his agent when they are against him, though he may consent to recall them when they are for his benefit.

(*b*) *Per* Holt, C. J., in ——— v. *Harrison*, 12 Mod. 346. The same point was decided in an action against Sir Robert Clayton and Mr Morris, for 200 guineas, taken up in their name by a servant who had been in use to

draw money for them, before his dismissal could be known. The case is stated in Beawes, No. 231, and in Molloy, B. 2, c. 10, and cited 10 Mod. 110, in *Nickson v. Brohan*.

(*c*) The opinions of the Court appear to have been unanimous, at least to this extent, in *Pollock v. Paterson*, 10 Dec. 1811, F. C., though the case was not decided on that ground. 1 Bell's Com. 489, N. 2.

(*d*) 1 Bell, 490.

it, made by any one partner in the company's name before the dissolution is made known to them, affords an illustration of this principle.

How procura-
tion exercised.
—Act must be
in principal's
name,

A person who subscribes a bill or note will not in general bind his principal, unless he writes his principal's name *per* his procuration (*a*), or signs his name as agent for the principal (*b*), or in some other way indicates his character of agent (*c*). 'It is not enough that the drawer be known to be the agent of the principal, and be known to be drawing for his behoof. The credit of the principal is not understood to be pledged unless his name appears on the bill; and if the person taking the bill chooses to take it without that name, he has no action on the bill against him. This rule has been settled by the House of Lords (*d*), and was recently followed in circumstances where its application appeared to cause hardship (*e*). It is possible that exceptions may be admitted; but the expediency of having the general rule firmly established is so great, that they will be admitted with difficulty. An exception was allowed in one case, where it appeared, from a statement in the bill (as to the value received), that it had been granted for the principal (*f*).

and within
agent's
authority.

'When a bill is signed by an agent in name of his principal, notice is given that the signer's authority is limited; and persons taking or holding such a bill must satisfy themselves that the authority is sufficient to cover the act of the agent; for if the authority have been exceeded, the principal is not bound. In this respect mandates are somewhat strictly construed; the principal not being bound unless the act falls fairly within the scope of the authority. Thus, a mandate to draw bills is not a mandate to recover and apply their contents, and therefore does not authorize the agent to indorse (*g*). In considering the sufficiency of mandates,

(*a*) This mode of subscription is recommended by Lord Kenyon in *White v. Cuyler*, 6 T. R. 176. *Vide* also *Beawes*, No. 83.

(*b*) This mode of signature was held sufficient when adopted by one partner in subscribing a submission for another, in *Wilks and Another v. Buck*, 2 East. 142. *Vide* *Beawes*, No. 85.

(*c*) *Story on Bills*, § 76.

(*d*) *Telford v. Wood*, 26 May 1824, 2 S. Ap. 225; *Watson v. Bank of Scotland*, 26 Mar. 1813, 5 Pat. Ap. 655.

(*e*) *North British Bank v. Ayrshire Iron Co.*, 29 June 1853, 15 D. 782.

(*f*) *Murray v. Campbell*, 28 Nov. 1827, 6 S. 147.

(*g*) *Robinson v. Yarrow*, 7 Taunt. 455.

the class of bills to which they extend, and the purpose for which they were granted, must be carefully kept in view. If a principal grant authority to sign bills belonging to a specified class, he will not be bound if the agent sign bills not belonging to that class (*a*). And if the authority be to sign bills for a certain purpose, he will not be bound if the agent sign them for other purposes. Thus, a mandate to accept bills relative to a party's individual affairs, does not extend to the acceptance of bills for behoof of a company of which the party happens to be a partner (*b*); and a mandate to sign bills in the course of a particular business, does not authorize the agent to sign bills either for his own accommodation (*c*), or for that of another (*d*). But if an agent have two authorities, one limited and insufficient to cover the act, and the other general and sufficient, the act is of course valid (*e*); and if an agent, acting under a limited written authority, have been permitted to conduct himself, and enter into transactions, as if his authority were unlimited, thereby inducing a belief in the public that his authority was of that nature, the principal will not be allowed to repudiate his acts on the ground that the written authority did not cover them (*f*).⁷

An acceptor who pays under an indorsement made by virtue of a power which turns out to be nugatory, will be liable to pay again to the party in right of the bill (*g*). But he will not be entitled to claim repetition from a *bona fide* holder who has received payment, especially if he satisfied himself as to the power under which the indorsation was made, before he paid (*h*).

'If the agent has signed in proper form, and has not acted beyond his powers,' his principal and not he will be bound (*i*). If he subscribes his name, without adding words which either express

When agent personally liable —

If character not set forth,

(*a*) *Fearn v. Fillica*, 28 May 1844, 14 L. J., C. P., 15.

(*b*) *Attwood v. Munnings*, 1827, 7 B. and Cr. 278, 6 L. J. (O. S.) K. B. 9.

(*c*) *Stagg v. Elliott*, 8 May 1862, 31 L. J., C. P., 260.

(*d*) *Alexander v. McKenzie*, 20 Nov. 1848, 18 L. J., C. P., 94.

(*e*) *Withington v. Herring*, 1829, 5 Bing. 442, 7 L. J. (O. S.) C. P. 172.

(*f*) *Smith v. McGuire*, 4 June 1858, 27 L. J., Ex., 465.

(*g*) *Duncan v. Clyde Trs.*, H. L., 17 Mar. 1853, 15 D. 36.

(*h*) *East India Co. v. Tritton*, 1824, 3 B. and Cr. 280, 3 L. J. (O. S.) K. B. 24. The authority of this case, as deciding the general rule, has been questioned.—Story on Bills, § 110.

(*i*) *Rankine v. Mollison*, 17 Feb. 1788, M. 4064.

liable (*a*). ‘The presumption being that every one who signs a bill makes himself personally liable, the agent must, in order to remove that presumption, make it distinctly appear that he signs *only* in his character of agent. It is not sufficient to protect him from personal responsibility, that he be known to be agent, and that the bill bear to be for behoof of his principal (*b*), or even that in such a bill he be described as agent (*c*).’ If he has indorsed a bill individually, in order to get it discounted for behoof of his principal, he will be entitled to indemnity from his principal (*d*). ‘The converse of the rule that the agent who individually becomes a party to a bill, is the proper debtor, is, that if he happen to become holder, he is the proper creditor; and, in that capacity, it is he, and not the principal, who is ranked for the bill on a sequestrated estate (*e*).’

It has been said, that an agent contracting for Government is exempted from personal liability, and this is the case with furnishings made to him, or bills or notes which he subscribes, avowedly in his public character (*f*). But it has been decided, that, if he subscribes a bill individually, though in a public transaction, he will be personally liable for payment (*g*). In England it has been de-

(*a*) *Ainslie v. Arbuthnot*, 6 June, 13 July 1739, Morr. 4064, Elchies, No. 20, *v. Bill*, 1 Stewart and Craigie’s Appeal Cases, 340; *Connell v. M’Lelland*, 5 July 1782, M. 1485; *Baines v. Turnbull*, 1 Dec. 1795, Morr. 1485, 1 Bell, 379, note 4; *Thomas v. Bishop*, Rep. Temp. Hardw. 3, 2 Str. 955; *Lefevre v. Lloyd*, 5 Taunt. 749, 1 Marsh. 318; *Goupy v. Harden*, 7 Taunt. 159, 2 Marsh. 454, Holt, 342; *Appleton v. Binks*, 5 East. 147; and in *De Gaillon v. L’Aigle*, 1 B. and P. 368; *Burrell v. Jones*, 3 B. and A. 47.

(*b*) *Webster v. M’Calman*, 3 June 1848, 10 D. 1133 (overruling *Affleck v. Williamson*, 25 Feb. 1776, M. Apx. Writ, No. 1); *Leadbitter v. Farrow*, 1816, 5 M. and S. 345.

(*c*) *Chiene v. Western Bank*, 20 July 1848, 10 D. 1523.

(*d*) *Robinson ex parte*, Buck. B. C. 113; *Watson v. Kintore*, 1 Feb. 1862,

24 D. 427; *Robinson v. Fleming*, 1 July 1859, 21 D. 1089. The principal, however, not being a party to the bill, the agent has no action on it against him: *Gibson v. Rutherglen*, 6 Mar. 1841, 3 D. 806.

(*e*) *Wixon v. Nicol*, 22 June 1849, 11 D. 1188.

(*f*) *Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, id. 674; *Myrtle v. Beaver*, 1 East. 135; *Rice v. Chute*, id. 579; *Prosser v. Allan*, 1 Gow, 117. All these were actions for the price of furnishings made to public officers in their public character, and therefore they were found not personally liable.

(*g*) In *Douglas v. Earl of Dunmore*, 27 Nov. 1800, Morr. App. *v. Bill*, 15, this was found in an action of recourse, brought against his Lordship on a bill drawn by him on the Treasurer, in his character of Governor of the Bahama

cided that commissioners under an Act of Parliament are personally liable to the banker appointed by the Act for drafts bearing to be made by them on the public account, though these drafts are directed to be placed to their account as commissioners (a).

‘ A party who signs *per procuration* of another, gives a warranty that his authority entitles him to do so ; and if it turn out that he had no authority, or had exceeded his authority, he will be held personally liable for the consequences. Thus, a party who signed a bill for another, without authority, was found liable to pay its contents, as well as the costs of an action on the bill, which had been brought against the alleged principal (b). The fact that the person, acting as agent, did so in *bona fides*, does not free him from responsibility (c). The action against the pretended agent is in England not laid on the bill, but on the breach of warranty ; and as the person signing *per procuration* of the other does not, properly speaking, make himself a party to the bill, the same rule would probably be followed here. In America it seems to be held that he may be sued as a party to the bill (d).’

or if the authority is exceeded.

The duties incumbent on an agent who is employed to negotiate or get payment of bills shall be considered under the head of Negotiation and Payment.

We have hitherto supposed, that there is only one drawer, acceptor, or indorser of a bill or note. Let us now consider the case of several individuals becoming bound together in these different characters respectively : 1st, When they are not partners in trade ; and, 2dly, When they are partners.

3. Joint Obligants, not Partners.

When several persons, though not partners, subscribe a bill or note together as drawers, acceptors, or indorsers, they are liable *singuli in solidum*, whether the words “conjunctly and severally”

Joint obligants are liable severally ;

Islands. The Treasury ultimately paid the principal sum in the bill, and therefore the discussion was confined to a claim of interest.

(a) *Eaton v. Bell*, 5 Barnew and Ald. 34.

(b) *Polhill v. Walter*, 19 Jan. 1832, 1 L. J., K. B., 92. See also *Wilson v. Barthrop*, 1837, 6 L. J. (Ex.) 251.

(c) *Collen v. Wright*, 30 Nov. 1857, 27 L. J., Q. B., 215.

(d) *Chitty on Bills*, p. 27.

are used in the document or not (*a*). ‘The same obligation exists though the word “conjunctly” only should be used (*b*). In England, however, if a promissory-note is signed by several, and expressed, “we promise to pay,” it is only a joint note’ (*c*). A note subscribed by two parties, though using the words, “*I* promise,” has been found good against both, without a new stamp, if it was agreed that they should both sign; the word “*I*” being held applicable to each of them severally (*d*). The signature, however, of a note by one of two parties, as an individual, whether the two are in partnership or not, will not subject the other party in an action on the note, though it should have been granted as a security for a joint debt (*e*).

but must join
in negotiating.

When a bill or note is payable to several persons not in partnership, it cannot be transferred without an indorsement by them all. ‘Thus it was decided, that when a father and son both drew a bill payable “to our order,” and the son alone indorsed it, the indorsement was bad’ (*f*). It may be even doubted whether the

(*a*) *Gordon v. Sutherland*, 20 Jan. 1761, M. 14677; *Macmorland v. Maxwell*, 19 Jan. 1675, M. 14673; *Rutherford v. Donaldson*, 18 Feb. 1708, M. 14675; *A. v. B.*, 10 Dec. 1724, M. 14675.

(*b*) *Mackellar v. Campbell*, 7 June 1811, F. C.

(*c*) See Chitty, p. 355.

(*d*) *Clark v. Blackstock*, Holt, 474, per Bayley, J.; *Lord Galway v. Matthew*, 1 Camp. 402. In *March v. Ward*, Peake, 129, Lord Kenyon held, that a note signed by two parties, though bearing only the words, “*I* promise,” etc., was good against both. In *Hall v. Smith*, 2 D. and R. 584, 1 B. and Cr. 407, where a note was thus signed, “For W. Smith, W. P. Smith and W. R. Taylor, W. Smith,” W. Smith was held by the Court of K. B. to be liable severally for the note.

(*e*) *Siffkin v. Walker*, 2 Camp. 308. The same doctrine was admitted in *Emly v. Lye*, 15 East. 7, where there was a partnership, in so far as regarded the action *on the bill*, although a claim was also attempted under the count of money had and received.

(*f*) *Carwick v. Vickery*, 2 Dougl.

653. A contrary doctrine appears, at first sight, to have been held in Scotland, in *Robertson v. Forbes*, 17 Jan. 1685, M. 14674, where, according to Fountainhall, it was decided, that two payees of a bill were *correi credendi*, and that payment to one liberated the debtor for the whole, reserving to the other payee his recourse against the co-creditor. But the report by Harcarse bears, that the Court held the sum in the bill to belong to the payees equally, so that neither of them could indorse the whole sum, but *only the half*. But the right to transfer and to receive payment of bills appears to rest on the same footing. Now, as a bill or note forms one entire obligation, it appears not capable of being either transferred or discharged without the signature of all the obligees. Each of them may, according to Harcarse, have an equal interest *inter se*; but the debtor is not, therefore, obliged to consent that an obligation, which is indivisible, should be divided by separate discharges or indorsements from each. He seems entitled to refuse payment till he gets full possession of the bill.

debtor is bound to pay, except on a demand by them all, or whether action or diligence can proceed against him, except in their joint names. If any of them refuses to concur in necessary measures, the remedy appears to be an action by the others against him. If, indeed, the bill or note should be made payable to both of them, "conjunctly and severally;" or, as these words have been interpreted (a), "to them or either of them," either of them may take payment, on giving up the bill discharged. But no such power seems to exist otherwise. 'In the case of a joint and several note, where it happened that one of the several acceptors was one of two joint drawers, it was held that the latter could sue any one of the former (b).' A bill is binding on none as drawers but those who sign it (c), and, when drawn on several individuals not in partnership, and not accepted by more than one, it is binding only on the acceptor (d), though the drawer should be factor for all the drawees (e).

4. *Partners.*

Partnership implies a general mandate to each partner, to bind the company and individual partners, by subscribing for them any obligation which comes within the ordinary course of their business (f). Any partner, therefore, may bind the company to third parties by signing bills or notes in their name, whether for the price

Partners may
bind trading
firm by bill,

and a discharge from every person entitled to sue on it. Their remedy, if any of them refuses to concur in a discharge, or an action for payment, appears to be by an action against him for his concurrence, and for the damage arising from his refusal. In *Lyon v. Ardoch*, 15 Dec. 1744, M. 14676, two of three payees in a bill, although the third refused his concurrence, obtained decree against the acceptor for the full sum. But the acceptor knew that the sum in the bill had been borrowed by them all jointly; so that they were found entitled, in a question with him, to sue singly for its amount, in order to relieve them from this loan, for the whole of which each of them was liable.

(a) *Forbes*, 119.

(b) *Beecham v. Smith*, 28 May 1858, 27 L. J., Q. B., 257.

(c) *Hunter ex parte*, 2 Rose, B. C. 363.

(d) This doctrine is laid down by Molloy, 2, 10, 18; Beawes, No. 228; Marius, 64; and Buller, N. P. 270.

(e) Molloy, 2, 10, 19.

(f) *Erskine*, iii. 3, 20. It was decided in *Lumsden v. Gordon*, Nov. 1728, M. 14567, that a partner cannot enter into a submission regarding the company's joint affairs; and in *Bo'ness Canal Co. v. Macalpine*, 13 June 1791, M. 14572, the Court held that subscribing to a canal company did not fall within the powers of an individual partner, although they also held that the assent of the company to such subscription by him must be presumed from their subsequent acts.

of furnishings, for money advanced in the course of business, or otherwise within the limits of their trade (*a*). ‘But as the power to sign bills does not commence till the partnership is actually formed, a bill signed by one of a number of persons about to form a partnership does not bind the company, even though it should be signed for a partnership purpose,—for example, for the purpose of raising capital, on which the future firm should trade (*b*). And it has been held in England, that the power to sign bills for the firm is not possessed by the individual partners of all companies, but belongs only to partners of companies in which it is in the necessary or usual course of mercantile transactions for the company to bind itself by bills of exchange (*c*). “Partners in trade,” it has been laid down (*d*), “have authority as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do. This authority is by the custom or the law of merchants, which is part of the general law of the land; but the same reasoning does not apply to other partnerships.” Thus, a member of a firm of attorneys has no power to bind the firm by promissory-note, even for a debt due by it (*e*). In the same way, partners of mining (*f*) and gas-light (*g*) companies, and a partner in a farm (*h*), have been found not entitled to bind their copartners by bill. In Scotland no cases appear to have occurred where this point has been raised; but it appears that a somewhat similar principle has been recognised, for in one case,’ a bill indorsed

(*a*) *Dewar v. Miller*, 14 June 1766, M. 14569, 2 Bell’s Com. 615. This principle is so fully settled in England as well as Scotland, that it is sufficient to refer to *Pinckney v. Hall*, 1 Salk. 126, Lord Raym. 175; *Smith v. Jarves*, Lord Raym. 1484; *Lane v. Williams*, 2 Vern. 277–92; and *Harrison v. Jackson*, 7 T. R. 207, where the general rule was admitted, though held inapplicable in the particular case.

(*b*) *Per Bayley, Greenslade v. Dower*, 7 B and C. 635; 6 L. J. (K. B.), O. S., 155.

(*c*) Chitty, p. 35.

(*d*) *Per Denman*, C. J., in case quoted next note.

(*e*) *Hedley v. Bainbridge*, 25 June

1842, 11 L. J. (Q. B.) 293. In this case a client deposited a sum of money (to be lent on mortgage) with a partner, who granted a promissory-note for it in name of the firm. It was held that the note did not bind the firm, and consequently the holder was nonsuited in an action on it against another partner.

(*f*) *Dickinson v. Valpy*, 10 B. and C. 128, 8 L. J. (K. B.) O. S. 51. The bill in this case was granted in discharge of a claim on the company for surveying mines.

(*g*) *Bramah v. Roberts*, 1837, 3 Bing. N. C. 96, 6 L. J. (C. P.) 346.

(*h*) *Greenslade v. Dower*, note *b*, *supra*.

by a partner with the company's firm in a transaction out of the line of their trade was found not binding on them (a).

Though the company contract should prohibit him from signing these documents, the public, not being bound by such a prohibition, but being entitled to rely on the power implied in his character of partner, will not be affected by it (b). 'If it be proved that the bill was issued by one partner, in fraud of the others, contrary to such a prohibition, the holder in England will have to show that he gave value (c). In Scotland, the presumption that the holder gave value would not be overcome; for the provision of the Mercantile Amendment Act relating to proof of value given by the holder, refers only to bills fraudulently *obtained*, evidently implying that there must be proof that the person obtaining the bill was a party to the fraud (d).' But a partner's signature of the company firm will not be available to a party who knew that he was prohibited from signing, as the character of partner merely raises a presumption of power, which may be redargued by contrary notice (e).

even though contract of copartnership forbid it,

It has been held (f), that a bill accepted by the secretary of a joint stock company "for the directors," did not bind the company, a special authority which he had to accept certain bills being held to be inapplicable; 'and there being no general authority in the secretary of a company, as such, to negotiate bills for it. Where a person, not a partner, signs for a company, his power to bind his constituents must be seen to by the person taking the bill; for if he exceeds his authority, the holder will be without recourse against the company. He may, however, have recourse against the

and may empower agents to sign for them.

(a) *Stein v. Calder*, 2 Feb. 1794. *Vide* note of this case by Mr Bell, i. 402, note 8, where he also refers, on the same subject, to a case, *M'Nair v. Henderson and Co.*, 19 Jan. 1803.

(b) This doctrine is implied in the Lord Chancellor's opinion in *ex parte Bonbonus*, 8 Ves. 542, which *vide*.

(c) *Grant v. Hawkes and Another*, 1817, Chitty, 32, note 9, where the indorsee of a bill, accepted in name of a certain company by a partner, brought an action against the other partners; it being proved that the articles of copartnership prohibited members from circulating bills or notes in the company's

name, Lord Ellenborough held that the plaintiff, in order to recover, must show that he had given value.

(d) 19 & 20 Vict. c. 60, § 15.

(e) In *Galway v. Matthew*, 10 East. 263, action against the partner of a company, on a note granted by another partner in name of all the partners, after the plaintiff had notice from the defendant that he would not pay notes signed by this party in the company's name, was refused on the ground now stated. *Vide* also *Willis v. Dyson*, 1 Stark. 164, and *Vere v. Fleming*, 1 Yo. and Jar. 227.

(f) *Neale v. Turton*, 4 Bingh. 149.

manager. For if the manager of a company, not having authority to accept bills, accept one "for the company," even when drawn for goods supplied to it, and addressed to him as manager, he is held to be personally liable,—the company not being liable, and the Court being bound to construe the writ, *ut magis valeat quam pereat* (a). In general, the relations between companies and their agents seem to be the same as between individuals and their agents.' It has been held that a partner may authorize a third party to indorse bills as agent, with the company firm, so as to bind the company (b).

All partners
are liable on
company bills.

Any partner, though his name do not appear in the firm (c), or any person who allows himself to be represented as a partner (d), will be liable. 'The signing of the bill by a partner with the name of the firm, constitutes the debt against the company; and the holder may therefore use action (e), or do diligence (f) against any one of the partners, without joining the others. And he may proceed against any one of them, whether the name of the partner selected appears in the company firm or not (g), and whether he have been a secret or an acting partner (h). It makes no difference to the holder's right to proceed against a partner, that the firm itself, or other partners of it, are not within the jurisdiction of the Court to which he has resorted (i). In England the rules on these points

(a) *Nicholls v. Diamond*, 3 Nov. 1853, 23 L. J. (Ex.) 1. The bill in this case was addressed, "To J. D. Purser, West Downs Mining Co.," and was accepted by "J. D., *per proc.* West Downs Mining Co." J. D. was held personally liable on the bill. See also *Mare v. Charles*, 30 Jan. 1856, 25 L. J. (Q. B.) 119, where a bill for "value received by the co." was directed to A. B., and was accepted by him, "For the Co., A. B. purser;" and where it was held that A. B. was personally liable, on its appearing that he had no authority to accept bills.

(b) *Tennant v. Strachan*, 1 M. and Malk. 378.

(c) *Swan v. Steele*, 7 East. 210. In *Lloyd v. Ashby*, 2 B. and Ad. 23, where one of the partners of a company in which the defendant was a sleeping partner having accepted, in name of

the company, a bill drawn by his father for a debt due by a previous company, in which the defendant had no concern, it was held, on full argument, that the acceptance, being under the proper designation of the new firm, bound the new partner. *Vide* to the same effect, *Wintle v. Crowther*, 1 Cr. and Jarv. 316, and *Heywood v. Watson*, 4 Bingh. 496.

(d) *Fox v. Clifton*, 6 Bingh. 791; *Doubleday v. Muskett*, 7 Bingh. 117.

(e) *M'Tavish v. Saltoun*, 3 Feb. 1821, F. C.

(f) *Wallace v. Plock*, 19 June 1841, 3 D. 1047.

(g) *Selkrig v. Dunlop*, 30 May 1804, H. 277.

(h) *Watson v. Smith*, 17 Dec. 1806, H. 756.

(i) *Sutherland v. Gunn*, 17 Jan. 1854, 16 D. 339; *Wallace v. Plock*,

are different, the holder of a bill due by a company being bound to sue all the partners (a); but he is not bound to join a partner who was unknown to him in an action with those with whom he contracted, but may sue them alone (b), though he would be bound, in the ordinary case, to sue the whole. Though a bill should be drawn by a foreign house on a branch in this country, who refuse acceptance, the partners in this country will be liable individually to diligence as drawers (c).

It will be no defence that the partner who signed the bill or note has done so fraudulently for his own behoof, or has applied the funds arising from it to his own use, if the party who deals with him knew nothing of the fraud (d). But a party privy to it cannot take benefit by the bill or note (e), though it will be good to a *bona fide* indorsee (f). 'Proof that the drawer of a bill had taken the acceptance from a partner in fraud of the firm, if it do not affect the indorsee with knowledge of the fraud, does not even oblige him to prove that he gave consideration (g).' Accession to fraud will be presumed, when a person takes a bill or note, drawn or accepted by a partner under the company firm, in payment of his separate

except when fraudulently taken for private purposes.

supra, note 6; *Thomson v. Liddel*, *infra*, note (c).

(a) 1 Chitty on Pleading, 6th edit. 42. In *ex parte Buckley*, 2 July 1845, 14 L. J. (Ex.) 341, the general rule was admitted; and it was held (overruling *Hall v. Smith*, 2 D. and R. 584) that the fact of a note, signed by a partner, for himself and the other partners, commencing "I" instead of "We promise," did not make the case exceptional.

(b) *De Mautort v. Saunders*, 1 B. and Ad. 398; *vide ex parte Hodgkinson*, 19 Ves. 291, and *ex parte Norfolk*, *id.* 457.

(c) *Thomson v. Liddel*, 2 July 1812, F. C.

(d) Lord Chancellor Eldon, in *ex parte Bonbonus*, 8 Ves. 540, where a partner drew a bill in the company's name, for his own accommodation, held that the company was liable, the

creditor being quite innocent of the fraud.

(e) In *Arden v. Sharpe*, 2 Esp. 524, the plaintiff was found not entitled to sue the partner of a company on a bill indorsed to him by the other partner under the company firm, the indorser having told him to keep the transaction secret from his co-partner, which was held sufficient to have made him aware of the fraud. *Vide also Wintle v. Crowther*, 1 Cr. and Jerv. 316; and *Matheson v. Fraser*, 6 June 1820, H. 758.

(f) *Clark v. Shepherd*, 23 Feb. 1823, 2 S. 255.

(g) *Mungrave v. Drake*, 14 Nov. 1843, 13 L. J. (Q. B.) 16. It may be questioned, however, whether such a bill would not be considered as "fraudulently obtained," under the Mercantile Amendment Act, 19 & 20 Vict. c. 60, § 15.

debt, without informing the other partners (a). 'Where a separate creditor takes a bill for his separate debt from his debtor, under the style of a firm of which the debtor happens to be a partner, the presumption naturally is, that the bill is taken without the authority of the other partners, and it lies on the creditor seeking to make them liable to prove that they authorized the acceptance (b). This is the rule in questions between the holder and the firm. In questions between the holder and previous parties to the bill, where there are any, as where a bill belonging to a company has been indorsed for a private debt, the authority to indorse is presumed sufficient, if it be not challenged by some of the partners of the firm (c). In this case, if the partners do not challenge the act of their copartner, no one else has any legitimate interest to do so. If a company discover that a partner is in the practice of improperly signing bills with the name of the firm for his own purposes, they can have their remedy on applying to the Court for interdict (d).'

Subsequent approbation by the partners of a company will give efficacy to acts of a partner, which would not otherwise have been valid (e).

(a) This principle was established in the cases of *Miller v. Douglas*, 22 Jan. 1811, F. C.; *Kennedy*, 22 Dec. 1814, F. C.; and *M'Nair v. Gray*, 19 Jan. 1803, H. 753; and was applied in *Johnstone v. Phillips*, 24 July 1822, 1 Sh. Ap. 244; *Proudfoot v. Lindsay*, 18 Jan. 1825, 3 S. 443; *Blair v. Bryson*, 11 June 1835, 13 S. 901.

(b) *Levieson v. Lane*, 7 Nov. 1862, 32 L. J. (C. P.) 10, and the authorities there cited. In this case, a partner, in order to raise his share of capital, bought diamonds, for which he granted his own bill, and which he immediately pledged, placing the proceeds to the credit of the firm. When the bill fell due, he renewed it by a bill accepted in name of the firm. In an action on the renewed bill by the drawer against another partner, held that it lay on plaintiff to show that the bill had been drawn with defendant's authority.

(c) *Ridley v. Taylor*, 1814, 13 East.

175 (as explained in *Levieson v. Lane*, note), P. sold coals to E. on his separate account, and E. gave in payment a bill drawn and indorsed by a firm of which he was partner, and accepted by D. P. sued D., and had judgment, the other partner not having been called to disprove the authority to indorse.

(d) *Taylor v. Taylor*, 25 Jan. 1823, 2 S. 157; Chitty, p. 36.

(e) In *Sandilands v. Marsh*, 2 B. and A. 673, one partner was held bound, by a guarantee of a purchase of annuities made by another partner in the company's name; because, though the transaction did not fall under the company's usual business, it had been entered in their books, so that all the partners either must or ought to have known of it. A similar decision was given in the case of *Blackwood and Co. v. Bower*, 11 July 1805, and 17 June 1806, cited in 1 Bell, 402, note 8.

When a bill is drawn by a partner, or managing director of a company, for their behoof, and indorsed by him to their actuary, who indorses it to a partner for the company, the latter cannot sue the original indorser personally on the bill, seeing it was subscribed by him for the company, or even for money recovered by him on the bill from the acceptor, that being recovered by him for the company's behoof (*a*). It has been also held, that the drawer of a bill, being partner of a company, cannot sue the company as acceptors (*b*).

Bills between partners.

In joint trade, which is a partnership for a limited purpose, the doctrine regarding the power of one partner to bind the rest appears to be that already laid down, under these exceptions, viz. 1st, That there is generally no firm in such transactions, although a partner may adopt some other mode of showing that his obligations are contracted for the common concern, not individually; and 2dly, That such obligations will not be effectual against the other partners, if they relate to any transaction which is not the subject of the joint adventure (*c*). For instance, it has been decided that a partner of a joint-stock banking company, discounting a bill as an individual, was not bound by the alleged actings of the company's agent relative to that bill, or liable to the exceptions pleadable against him (*d*). But a note drawn in the same way with others which have been acknowledged as relating to the joint concern will bind all the partners, though made for the private accommodation of one partner, unless this was known to the holder. The joint partners having no unlimited powers of binding each other with reference to the public, their obligations are restricted to the purposes of the contract under which they act. 'If, however, the signing of any particular bill fall fairly within these purposes, all the partners will be bound by it, though neither all their names, nor the name of the joint adventure, should appear on it. For

Bills by joint adventurers.

(*a*) *Teague v. Hubbard*, 8 B. and Cr. 345.

(*b*) *Neale v. Turton*, 4 Bingh. 149.

(*c*) In *Williams v. Thomas*, 6 Esp. 18, the defendants, who had become bound to guarantee the outfit of a particular ship in conjunction with the shipmaster, were found not to have

made themselves liable thereby on a bill drawn for the accommodation of one of them, and accepted by him on his own account. *Vide also Peele ex parte*, per Lord Eldon, 6 Ves. 604.

(*d*) *Downes v. M'Fie*, 12 Dec. 1829, 8 S. 246.

example, if it be one of the purposes, that money should be raised for the adventure, by discounting bills drawn by one of the partners on another of them, the holder of such a bill will be entitled to sue a third partner for its contents (a).'

Form of
partner's
signature.

A partner's subscription, in order to bind the company, must bear to be for its behoof. This may be indicated by his subscribing the firm (b), or subscribing his own name "for the company" (c), or for the partners by name (d). But the company will not be bound by a bill or note, if they do not appear on it (e) 'in their true style' (f); as, for instance, where only one of two parties signs a note, though it should be granted as a security for a joint debt (g); or where a partner signs a bill individually, even for money which is ultimately applied to the company's use (h); or where a bill is drawn on two partners, and only one of them accepts (i). It is the same, in this point of view, whether the bill so accepted be drawn on a private or an incorporated company (k). 'If the firm be a descriptive one, it is sufficient to bind all the partners, that one of them sign the firm and his own name (l), but it would probably not be enough to sign such a firm alone' (m).

(a) *British Linen Co. v. Alexander*, 14 Jan. 1853, 15 D. 277.

(b) *Pinkney v. Hall*, 1 Lord Raym. 175.

(c) *Aberdeen Brewery Co. v. Gray*, 1824, M.S.; *Williamson v. Johnson*, 1 B. and C. 146.

(d) *Galway v. Matthew*, 1811, 10 East. 264; *Norton v. Seymour*, 15 Jan. 1847, 16 L. J. (C. P.) 100.

(e) This principle seems to have been recognised in *Le Pine and Others v. Bayley*, 8 T. R. 325.

(f) *Kirk v. Blurton*, 8 Dec. 1841, 12 L. J. (Ex.) 117. The style of the firm being "John Blurton" simply, it was held that a bill signed "John Blurton and Co." did not bind them. But in *Stephens v. Reynolds*, 25 April 1860, 29 L. J. (Ex.) 278, a partner was held bound by bill addressed to the firm at a wrong place, and accepted by his co-partner.

(g) *Siffkin v. Walker*, 2 Camp. 308.

(h) *Emly v. Lye*, 15 East. 7; *Emly*

ex parte, 1 Rose, 61, and *Husbands ex parte*, 2 Gl. and Jam. 4; *Hogg v. Weir*, 24 June 1748, Elchies, No. 10, v. Society.

(i) *Marius*, 64. In *Mason v. Rumsoy*, 1 Camp. 384, one of two partners having accepted individually a bill addressed to the company, this was held by Lord Ellenborough to be constructively the company's acceptance. But it may be doubted whether this doctrine would be adopted in Scotland. In *Johnston v. Cliftonhill Coal Co.*, 24 Nov. 1852, 15 D. 84, it was doubted whether a bill addressed to a company could be held duly accepted by the individual signatures of all the partners.

(k) *Molloy*, 2, 10, 19.

(l) *Blair Iron Co. v. Alison*, 13 Aug. 1855, 18 D. (H. of L.) 49. Compare *Fleming v. Ballantyne*, 13 D. 1842, 5 D. 305.

(m) *Culcreuch Cotton Co. v. Mathie*, 27 Nov. 1822, 2 S. 47.

In one case (a), where a partner abroad was in the habit of raising money by authority of the company, and of drawing bills for that purpose on the firm, which the partners at home generally accepted, they were held liable for the amount of some bills so drawn, which they had not accepted: not, however, on the bills, or on the ground of their partner's individual signature as drawer being the signature of the firm, but as for money received for their use by their authority.

When all a company's transactions have been carried on, and their obligations signed, with the name of one partner, his signature may be considered as the company's firm, and the whole partners will probably be liable to an action on it. But as the signature affords a presumption, that only the individual partner is liable, which presumption must be redargued by proof, a bill or note thus signed does not appear to be a ground for summary diligence (b).

Partnership, in so far as regards the individual partners, may be dissolved, 1st, By the death of one or more of the partners, unless the contrary is stipulated; a *delectus personarum* being implied, which excludes from the partnership the personal representatives of a deceased partner (c), although his effects and his representatives are liable for his past contractions as a partner (d).

Dissolution of
partnership.

By death.

Partnership ceases, 2d, By the sequestration of the company, or the execution of a trust deed for behoof of their creditors, as either of these events puts an end to the concern, and transfers the whole property to new parties; or by the sequestration of an individual partner, which transfers his interest to a new party, who, on the principle of *delectus personæ*, cannot be substituted for him as a partner. A trust deed for his creditors would, on this principle, have the same effect (e). In England, an act of bankruptcy by one of several partners cuts off his power, as an act of bankruptcy in name of the company cuts off the power even of solvent partners

By sequestra-
tion.

(a) *Denton v. Rodie*, 1809, 3 Camp. 493, per Lord Ellenborough.

(b) The principles applicable to such a signature are laid down by the Lord Chancellor in *Boletho ex parte*, 1 Buck 100, and in the *South Carolina Bank v. Case*, 8 B. and C. 433. See also *Wintle v. Crowther*, 1 C. and J. 316.

(c) Vide Opinion of Lord Chancellor Eldon in *Crawshay v. Maule*, 1 Swanst. 509; and *Crawford v. Hamilton*, 3 Madd. 251.

(d) *Jacomb v. Harwood*, 2 Ves. sen. 265; *Daniel v Cross*, 3 Ves. sen. 277; *Devaynes v. Noble*, 1 Meriv. 616.

(e) Menzies on Conveyancing, p. 430.

to indorse bills belonging to the company (*a*). But if the company is still in trade, and a person who has become bankrupt continues ostensibly a partner, for instance, if his name remains in the firm, he may accept a bill with the firm, so as to bind them in a question with a *bona fide* indorsee (*b*). In a Scotch case, where a partner of a company which had signed a bill, after getting his certificate under a commission of bankruptcy against him, wrote a letter to the holder of the bill, signed by the company firm, the Court refused to pass a suspension by him of a charge on the bill, without caution (*c*).

By renuncia-
tion.

Partnership ceases, *3d*, By the renunciation of any one partner, which dissolves the partnership, and may be made on the shortest notice (*d*), unless there is a stipulation to the contrary, subject, however, to the restriction, that he cannot take an undue advantage of the other partners by making it unfairly (*e*).

By incapacity.

Partnership ceases, *4th*, By the incapacity of a partner, which is variously interpreted, according to the duties that he has to perform by the contract; there being no reason to hold that every illness, which may disable him for a time, dissolves the partnership, while inveterate insanity in a partner who was, by the contract, to contribute his skill and industry, would probably do so (*f*).

By expiry of
period.

Notice of
dissolution:

When re-
quired;

Partnership may be dissolved, *5th*, so far as the partners are concerned, on expiration of the period fixed for it by the contract.

But, besides, certain steps are necessary to make the dissolution effectual against the public, so as to free the partners from debts afterwards contracted in name of the company. The mandate to each partner, which partnership implies, having been once publicly exercised by him, third parties are entitled to hold that it continues till its termination has been notified to them, or has become notorious. With regard to those modes of dissolution, viz., by renunciation, incapacity, or the expiration of the

(*a*) *Thomason v. Frere*, 10 East. 418; *Ramsbottom v. Lewis*, 1 Camp. 278.

(*b*) *Lacy v. Woolcot*, 2 D. and R. 458.

(*c*) *Hunter v. Evans*, 9 Dec. 1830, 9 S. 159.

(*d*) 2 Bell, 631, per Sir William Grant in *Featherstonehaugh v. Fenwick*, 17

Ves. jun. 298; also per the Lord Chancellor in *Crawshay v. Maule*, note 1.

(*e*) *Marshall v. Marshall*, 26 Jan. 1815, F. C.

(*f*) Per Lord Chancellor Eldon in *Waters v. Taylor*, 2 Ves. and Beames, 303.

stipulated term of copartnery, none of which are notorious, third parties must have express notice (*a*). It has been held in England, that no party can demand notice of the retirement of a sleeping partner, without showing that he was known to be a partner (*b*). But in Scotland it has been held that such notice is equally necessary with regard to public and private partners (*c*), ‘unless, from special circumstances, it appear that the creditor could have placed no reliance on the liability of the former private partner (*d*).’ The dissolution of a company by sequestration is made public by the statutory advertisements respecting the sequestration, which must be inserted in the London and Edinburgh Gazettes. It has been laid down (*e*), ‘in England,’ that the death of a partner would in itself dissolve the partnership, without notice; ‘and this rule has been applied in Scotland (*f*).’

Those who have dealt with the company must receive notice, to counteract the knowledge which they have of its former state, from their own course of dealing. 1. The most obvious mode of notice is by circulars, which, according to Lord Ellenborough, it is prudent to send “to all with whom the partners had dealings” (*g*). If a circular is put into the Post-office, properly addressed, the presumption

How notice
given to cus-
tomers;

(*a*) The reverse of the doctrine stated in the text was once held, in *Armour v. Gibson*, 29 Nov. 1774, Morr. 14575, where a party, having withdrawn from a company at the end of three years, in terms of a reserved power in the contract, by a minute entered in the books, but without any other notification, was found entitled to a suspension of diligence used against him on bills granted afterwards in name of the company. But a different doctrine was held, in *Bolton v. Mansfield, Hunter, & Co.*, 21 Nov. 1786, F. C., 2 Bell, 639, note 7, where a secret change in a partnership was held not to affect a third party, without intimation; and, in the subsequent case of *Dalgleish v. Fleming*, 24 May 1791, M. 14595, H. 746, it was decided that a private agreement dissolving a partnership at a certain time could not release a partner from the payment of

bills, granted under the company's firm by the managing partner, after the stipulated dissolution, but before it was publicly advertised.

(*b*) Per Lord Kenyon in *Evans v. Drummond*, 4 Esp. 89. Vide also *Carter v. Whalley*, 1 B. and Ad. 13; and *Heath v. Sanson*, 4 B. and Ad. 172.

(*c*) *Hay v. Mair*, 27 Jan. 1809, F. C. Vide *Fox v. Clifton*, 6 Bingh. 792.

(*d*) *Aitken v. Charles*, 4 Feb. 1830, 8 S. 446.

(*e*) Per Lord Chancellor Eldon, 3 Merivale, 614; *Brown v. Leonard*, note 2.

(*f*) *Aytoun v. Dundee Banking Co*, 19 July 1844, 6 D. 1409. See also *Cheap v. Aiton*, 11 Dec. 1772, 2 Pat. App. 283, and *Christie v. Royal Bank*, 17 May 1839, 1 D. 745.

(*g*) *Jenkins v. Blizzard*, 1 Stark. 418.

will be, as with a letter notifying the dishonour of a bill (*a*), that it reached the party to whom it was addressed, and he will be bound to prove that it did not (*b*). 2. Such a change in the firm as must excite observation, and should lead all parties interested to inquire anew into its character and credit, will operate as sufficient notice, even with reference to previous customers, especially if it appears in documents habitually issued to customers (*c*). 3. The delivery, at the house of a former customer, of a newspaper containing notice of dissolution, is one circumstance to prove his knowledge, though it will not *per se* be sufficient (*d*). Still less is a notice in the Gazette sufficient against customers (*e*), ‘unless, indeed, it be proved that they had actually seen it (*f*).’ In one case, the Court of Session, without deciding on the effect of a notice in the Gazette, found that a notice in one provincial newspaper was not binding on customers (*g*). The only general rule laid down in this case was, that there must be reasonable notice (*h*).

And to strangers.

With regard to persons who have not dealt with the company before, there is a difference between our notions and those entertained in England. In England there seems to be a doubt, whether

(*a*) *Saunderson v. Judge*, 2 H. Bl. 509; *Scott v. Lifford*, 9 East. 347.

(*b*) 2 Bell, 640.

(*c*) *Dunbar v. Remington*, 10 March 1810, F. C., where the chief indication of a new arrangement was a change in the firm. In *Barfoot v. Goodal*, 3 Camp. 147, where, in consequence of the partner of a banking house retiring, their printed checks had been altered by omitting his name, this change, without advertisement or circulars to customers, was held sufficient by Lord Ellenborough to affect a previous customer who had used the new checks, and he was therefore nonsuited in an action against the retired partner for a debt contracted by the house after the alteration.

(*d*) This was one of the circumstances left to the jury in *Jenkins v. Blizzard*, 1 Stark, 418.

(*e*) *Per* Lord Kenyon in *Graham v. Hope*, 1793, Peake, N. P. 154. In this case, although there had been a

notice in the Gazette, yet, as the jury held that the plaintiff, who had formerly dealt with the house, had got no special notice, they, under Lord Kenyon’s direction, found for him. See also *Kirwan v. Kirwan*, 5 May 1834, 3 L. J. (Ex.) 187, where a Gazette notice, even when accompanied by a continuance to do business with the firm, was held insufficient. The same doctrine was recognised in *Douglas v. Gordon*, 24 Dec. 1814, F. C.

(*f*) *Bertram v. M’Intosh*, 13 Feb. 1822, 1 S. 314.

(*g*) *Sawers v. The Tradestown Victualling Society*, 24 Feb. 1815, F. C., and 2 Bell, 641, note 4.

(*h*) In *Hart v. Alexander*, 17 April 1837, 6 L. J. (Ex.) 129, the jury were left to decide whether the plaintiff had notice, on a number of various circumstances, none of them sufficient in themselves, but raising in the aggregate a certainty that he must have known.

notice in the Gazette is sufficient in all cases even against strangers ; it being held in some cases that it is (a) ; whereas, in another case, it is said to be only a circumstance to be left to the jury from which to infer notice (b) ; or that it is not to be considered as notice, but only as a *medium* of knowledge (c). At all events, it is held that there can be no sufficient notice without either an advertisement in the Gazette (d), or knowledge by the party. But, in Scotland, the most recent doctrine is, that persons contracting with the company for the first time are bound to inquire into its condition *at that time*, and therefore, with regard to them, notice in a provincial newspaper was held sufficient (e). This doctrine would seem to dispense altogether with the necessity of notice as to such parties. But this appears to be doubtful ; for, supposing that they are bound to make inquiries, they will be misled by the previous state of the company, unless there is reasonable notice of its dissolution. The true doctrine, therefore, even with regard to strangers, appears to be, that there should be at least such information as may be obtained by proper inquiry. But knowledge by the parties will supersede the necessity of proving notice. Thus (f), where it appeared that the plaintiff knew of the deed of dissolution, being attorney for one of the parties, though its execution was not proved, Lord Ellenborough held, in an action for payment of a bill accepted to him afterwards by the firm, that it was with him to prove that the deed of dissolution had not been executed.

When a partner has given due notice of his retirement, he will not be bound by subsequent obligations signed under the firm,

Effect of notice lost by connivance at continuance.

(a) *Per* Lord Kenyon in *Abel v. Sutton*, 3 Esp. 108. *Vide* also Lord Kenyon's opinion in *Gorham v. Thomson*, Peake, 42 ; *Wrightson v. Pullan*, 1 Stark. 375, Bayley, 59, where a notice in the Gazette was held sufficient to relieve a partner from a bill accepted by the partnership firm after the notice, though ante-dated, so as to appear to be before it.

(b) *Per* Lord Kenyon in *Godfrey v. Turnbull*, 1 Esp. 171 ; and note to Peake, 155, which compare.

(c) *Per* Lord Ellenborough in *Williams v. Keates*, 2 Stark. 290. The

last edition of Chitty says :—" It appears to be clearly established that notice in the Gazette is, at all events, sufficient against all persons who have not previously had transactions with the firm," and refers to *Farrar v. Deffinne*, 1 C. and K. 580 ; *Newsome v. Coles*, 2 Camp. 617 ; and the cases already cited.

(d) *Gorham v. Thomson*, Peake, 42.

(e) *Sawers v. Tradestown Society*, 24 Feb. 1815. *Vide* particularly Lord Robertson's opinion.

(f) *Paterson v. Zachariah and Arnold*, 1 Stark. 71, part 2.

though he has not used legal measures to prevent another partner from continuing the firm (*a*). But any act of connivance in such a proceeding (*b*), as permitting the former sign, which contains his name as part of the firm, to remain over the door (*c*), or agreeing that his name should be used in a promissory note, with the names of the other partners, will render him liable (*d*). It has been even found, that when a partner intimates the dissolution, but informs the person to whom he intimates it that his name is to remain in the firm for a time, that person will have a claim against him for a note which is granted in name of the firm, before the time expires (*e*).

Effect of duly notified dissolution.

The dissolution of a partnership, duly notified, terminates the implied mandate of each partner to bind the others, so that, although one partner should be authorized to recover and discharge the company's debts, he is no longer entitled to subscribe bills with the firm, so as to bind the other partners (*f*). 'After the dissolution, a partner cannot grant a bill in the company's name, even for a debt previously due by the company (*g*).' Though the partners have still a joint interest in the funds, their characters are distinct, and any

(*a*) This was found in *Newsome v. Coles*, 2 Camp. 617, where the dissolution of a partnership having been notified, both in the Gazette and by circulars, to customers, the defendant (a partner) was held by Lord Ellenborough to have no concern with the subsequent use of the firm by another partner, and was therefore found not liable for a bill accepted under it.

(*b*) *Gardner v. Anderson*, 21 Jan. 1862, 24 D. 315.

(*c*) *Williams v. Keats*, 2 Stark. 290.

(*d*) *Brown v. Leonard*, 2 Chitty's Rep. 120.

(*e*) *Per* Lord Chancellor Eldon, 3 Merivale, 614; *Brown v. Leonard*, note 2.

(*f*) In *Kilgour v. Finlayson*, 1 H. Bl. 155, on a claim upon a bill drawn, with the company firm, by the partner of a dissolved company who had the powers above mentioned, it was admitted that the bill could not bind the

other partners; and the claim was rested on the ground of the proceeds having been applied to their use, which, however, was likewise unsuccessful. The same doctrine regarding the indorsement of a bill made under the like circumstances was held in *Abel v. Sutton*, 3 Esp. 108. *Vide* likewise *Henderson v. Wilde*, 2 Camp. 561. In another case, *King v. Smith*, 4 C. and Pay. 108, it was ruled, that one partner of a dissolved company might draw a bill on a company debtor for his debt, and that a stipulation by the partners, that the other partner should receive the company debts, was no defence against an action by him for this bill, as each partner had an implied power to recover company debts.

(*g*) *Snodgrass v. Hair*, 16 Jan. 1846, 8 D. 390; *Gordon v. M'Gubbin*, 14 June 1851, 13 D. 1154, 2 Bell's Comm. 644.

bill or note, to be binding against them, must be signed by them all (a). But it has been decided (b), that a bill drawn in name of a company by a partner, with a blank for the date and sum, and filled up by a clerk of the company, after this partner's death, and after the assumption of a new firm, with a date previous to the termination of the old company, was good against its other partners in the hands of an onerous indorsee. The power conferred by the subscription of the firm to this blank instrument was justly held to emanate from the company, and not from the individual who subscribed.

As partnership is dissolved by the removal even of one partner, any arrangement by which it may afterwards be continued under the firm is a new contract. Accordingly, when a change takes place in a house which has a cash-credit with a bank, the bank, if it wishes to give credit to the new company, and to retain their claim against the former cautioners, must either get a renewal of their bond, or have their assent, directly or indirectly, to the new credit given (c). In a case (d), where a person, who had a claim against a company for an account, agreed, on the formation of a new company with the same partners, excepting one who had retired, to take a bill for the debt from the new company, payable at six months, the Court held that the retired partner was thereby discharged, and that the old claim was innovated by the credit to the new company. 'This case, however, was special, and in such circumstances novation will not in general be presumed (e).' If a company continues to do

Obligations
taken up by
new firm.

(a) *Per* Lord Kenyon in *Abel v. Sutton*, 278, note 2. *Vide* also *Dolman v. Orchard*, 104, 2 C. and P., and *Harris ex parte*, 1 Madd. 583.

(b) *Per* Lord Ellenborough in *Usher v. Dauncey*, 4 Camp. 97.

(c) 1 Bell, 370. A construction founded on this principle was given to a cautionary-bond in *Simson v. Cooke*, 8 Moore, 588.

(d) *Buchanan v. Sommerville*, 19 Feb. 1779, M. 3402.

(e) *Pollock v. Murray*, 6 Nov. 1863, 2 M'Ph.; *David v. Ellice*, 5 B. and Cr. 196, where one of the partners of a banking company, which owed the plaintiff a balance on a cash-account,

had retired, and the plaintiff's balance had been transferred to the account of a new firm, he was still held to have a claim for this balance against the retired partner, though the transference of it had been notified to him, and he had not only expressed his confidence in the new firm, but had asked payment from them, and had drawn a bill on them for part of the balance. But each case of this kind must be decided on its own circumstances. See also *Thompson v. Percival*, 5 B. and Ad. 925; *Ramsay's Exrs. v. Grahame*, 18 Jan. 1814, F. C.; and *Milliken v. Love*, 23 Feb. 1803, H. 754.

business under its former firm, notwithstanding the removal of one or more partners, any contracts by third parties with reference to the firm, and not the individual partners—for instance, bonds for cash-credits to a public, though not chartered, banking company—will remain entire against the subsisting company (*a*). The company is new, in so far as regards the claims of partners *inter se*. But the firm, with reference to which third parties contracted, remains the same.

There is one case (*b*), not falling precisely under the foregoing principles, but connected with them, where two persons, ‘William and George Murray,’ agents for a bank, had taken a bill, which, after George Murray retired, was indorsed by William, in name of the old firm, to ‘William Murray and Son,’ who then became agents. In this case, the Court, proceeding probably on the ground that the two concerns, being both agents for the bank, were truly the same, allowed the books of the former concern to be admitted against the latter, as evidence that the bill had been given for an unlawful consideration.

(*a*) 1 Bell, 370, and 2 Bell, 636.
But see 19 & 20 Vict. c. 60, § 7.

(*b*) *Finlayson v. Murray*, 27 June 1822, 1 Shaw, 531.

CHAPTER III.

OF THE TRANSFERENCE OF BILLS AND NOTES.

BILLS and notes which are payable to the bearer, or to a certain person or bearer (*a*), or are blank in the creditor's name (*b*), or are blank indorsed, may be transferred by delivery, seeing any holder is entitled, by their terms, to exact payment.

What bills
indorsable.

The delivery of a bill or note, as has been already seen (*c*), is necessary to complete the transference, though it will be generally presumed from possession. But besides, in all bills or notes made payable to a certain individual, there must be an indorsation by the payee (*d*), or, as already explained, his name must be subscribed on the back of it, either with or without an order of payment prefixed.

It has been shown (*e*), that bills or notes, though not indorsable in England, without the words "to order," or equivalent words, are indorsable in Scotland. 'Before the Stamp Acts, if a person in England indorsed a bill not payable to order, he was held liable to his immediate indorsee as having drawn a new bill (*f*); but since the passing of these Acts it has been held that such an indorser cannot be made liable on the bill in any way—the supposed re-drawing being invalid for want of a stamp (*g*)—though of course any

Indorsation
of bills not
payable to
order,

(*a*) *Grant v. Vaughan*, Bur. 1516; *per Eyre*, C. J., in *Gibson v. Minet*, 1 H. Bl. 405.

(*b*) *Antea*, p. 48. In *Wookey v. Poole*, 4 B. and A. 1, it was decided by the Court of King's Bench, that an Exchequer bill payable to or order, being likewise declared payable to bearer by a memorandum at the foot of it, was transferable by delivery. It was assimilated in this respect to a bill of exchange.

(*c*) *Antea*, p. 89.

(*d*) *Per Eyre*, C. J., in *Gibson v. Minet*, 1 H. Bl. 505, who expresses this opinion with reference to bills or notes payable to a particular person or order.

(*e*) *Antea*, p. 52.

(*f*) *Hill v. Lewis*, 1707, 1 Salk. 132.

(*g*) *Plimley v. Westley*, 13 Nov. 1835, 5 L. J. (C. P.) 51.

ground of liability for the consideration received, which could be made out apart from the bill, would remain.'

and of invalid
bills.

Any objection affecting the validity of a bill or note must nullify the indorsement, since it is accessory to the bill or note. If the nullity is apparent *ex facie*, the indorsement will not be good even as a new bill by the indorser to the indorsee, because it is only an obligation in terms of the bill or note, which, *ex concessis*, is null from its terms (*a*). But when there is no such nullity *ex facie*, the indorsement becomes a good bill by the indorser to the indorsee.

SECTION I.

WHO MAY INDORSE?

Indorsement
by payee.

A bill or note may be indorsed by the payee, or any person to whom it has been transferred by him.

Indorsement
by a person
not payee.

Indorsement by a person not payee is void, though his name and surname be the same with those of the payee, and though the latter be not so described, as to distinguish him (*b*). There is here an error *in essentialibus* of the indorsee's title. But such an indorsement affords a claim against the indorser, and against subsequent indorsers (*c*). 'In Scotland, if a person who is not payee, indorse a bill with his own name, he is held liable as a new acceptor (*d*); and if such a person indorse a note, he is held liable as a joint-obligant with the maker (*e*). In England it has been held, that though such a person indorsing a bill cannot be sued as a new drawer (*f*), or when indorsing a note as a new maker (*g*), he may be sued as a guarantor (*h*).'

(*a*) In this view, the decision in *Thoirs v. Fraser*, M. 1472, whereby the indorsee was denied recourse against the indorser, was correct, although the ground of nullifying the bill, viz. that it stipulated annualrent and penalty, would not probably be now sustained.

(*b*) In *Mead v. Young*, 1790, 4 T. R. 28, this was decided by the Court of K. B. in the case of a bill payable to "Henry Davis or order," but which another Henry Davis had indorsed for value to the plaintiff.

(*c*) Bayley, 134.

(*d*) *Waters*, 7 Mar. 1818, F. C.; H. 68.

(*e*) *Don v. Watt*, 26 May 1812, F. C.

(*f*) *Burmester v. Hogarth*, 17 Jan. 1843, 12 L. J. (Ex.) 178.

(*g*) *Guinnel v. Herbert*, 1836, 5 L. J. (K. B.) 250.

(*h*) *Wilders v. Steven*, 12 Feb. 1846, 15 L. J. (Ex.) 108. There seems in England some uncertainty as to how such an indorsee should be sued, though his liability in some form seems settled;

An indorsement forged by a party not bearing the same name with a creditor in a bill or note, cannot convey a title even to a person taking it *bona fide* and for value (*a*), against even the drawee who signed it with this forged indorsement, because the drawee is bound to look only at the drawer's signature, and attests only its genuineness by his signature (*b*). 'A strong illustration of the principle that no title can be made through a forgery, was given in a case where a banker who paid a bill on a forged indorsation was not allowed to recover from the acceptors, though the indorsation had been on the bill at the time of acceptance, and the acceptors after examination had satisfied themselves as to its genuineness, and accepted the bill (*c*). When it is discovered that a bill is held under a forged indorsation, even a *bona fide* holder for value will be forced to give it up to the rightful owner (*d*).'

Forged
indorsement.

An indorsement, also, by a person who has right to a bill or note *ex facie*, will give the indorsee a title to it, though the indorser has got it for a different purpose; for instance, though he should have received a bill to be discounted for another, and pays it into his own account (*e*), or though he should have got it to recover payment, and indorses it away for value (*f*). It will afford a good objection, however, against the indorsee's right, if it be proved by his writ or oath that he got the bill or note from the indorser with an order not to negotiate it (*g*); and the indorsee's right will not be good, if it appears *ex facie* of the bill or note that his indorser held it for another: for instance, if it is made payable to him or order "for

Indorsement
by restricted
indorsee.

Matthews v. Bloxsome, 3 May 1864, 33 L. J. (Q. B.) 209.

(*a*) *Borland v. Thistle Bank of Glasgow*, Feb. 1768, M. 877; *Cheap v. Hanby*, cited 3 T. R. 127; *Smith v. Chester*, 1 T. R. 655; *Forster v. Clements*, 2 Campb. 17.

(*b*) *Per Buller, J.*, in *Smith v. Chester*, *antea*, note.

(*c*) *Robarts v. Tucker*, 4 Nov. 1854, 24 L. J. (Q. B.) 46; see also *British Linen Co. v. Caledonian Insurance Co.*, 19 March 1861, 4 M'Q. 107.

(*d*) *Johanson v. Windle*, 8 Nov. 1836, 6 L. J. (C. P.) 5.

(*e*) *Ramsbottom v. Cator*, 1 Stark. 288.

(*f*) *Collins v. Martin*, 1 Bos. and Pull. 651. A similar rule is laid down by Eyre, C. J., in *Bolton v. Puller*, 1 Bos. and Pull. 539, as likewise by the Lord Chancellor in *ex parte Peace*, 1 Rose, B. C. 238, where he holds the point to be quite settled.

(*g*) *Vide Roberts v. Eden*, 1 Bos. and Pull. 398, where these facts appear to have been established by other evidence. In Scotland, they could not have been proved but by the holder's writ or oath. *Bolton v. Puller*, 1 Bos. and Pull. 539.

account of" another party, or "for his use," and the indorsee, notwithstanding, takes it as a security for the payee's private debt, since he is certiorated that the payee had no right so to deposit it (*a*).

Indorsement
by bill broker.

With regard to the transference, by a bill-broker, of bills or notes lodged with him by his customers, to third parties, for money due by, or advances made to him, it has been decided in England, 1st, That, according to the general law, a bill-broker, who receives a bill to be discounted, is not entitled to transfer it in a mass with other bills, in security for a previous loan, or an advance made to himself (*b*). 2d, That a third party, so taking it in a mass with other bills, is barred from recovering, if he had reason to suspect that the broker was exceeding his powers in the transference, but otherwise that he has a good right (*c*). 3d, That, according to the usage of London, it is lawful for bill-brokers to transfer bills and notes deposited with them for discount, in one mass, for advances made to them, leaving their customers to claim against them (*d*); and, 4thly, That third parties, taking bills on the faith of such a usage, have a good claim on them (*e*). 'The dealing between the money-dealer and the bill-broker, is a separate transaction from the dealing between the owner of the bill and the bill-broker; and if the latter indorse the bill, or if it turn out a forgery, he is liable to the money-dealer for the advance (*f*). After he has transferred the bill to the money-dealer, he has no further control over it; and though the money-dealer should become bankrupt, he cannot interpell the acceptors from paying to him (*g*). But if he have transferred the bill for the special purpose of being discounted, the customer can prevent the money-dealer from retaining the proceeds for the broker's private debt (*h*).

Indorsement
by minors,
married

'An indorsement by a minor, though it does not bind himself, will give a right of action against other parties to the bill (*i*).' It has

(*a*) *Treuttell v. Barandon*, 8 Taunt. 100; *Sigourney v. Lloyd*, 8 B. and Cr. 226, S. C.; in Exchequer Chamber, 5 Bingh. 525; 3 Younge and Jerv. 221. See (*postea*, p. 188) this matter more fully treated under exceptions pleadable against the indorsee.

(*b*) *Haynes v. Foster*, 2 Cr. and M. 237.

(*c*) *Id. ibid.*

(*d*) *Foster v. Pearson*, 1 C. M. and R. 849.

(*e*) *Id. ibid.*

(*f*) *Gurney v. Womersley*, 4 Nov. 1854, 24 L. J. (Q. B.) 46.

(*g*) *Price v. Tennant*, 13 Feb. 1844, 6 D. 659.

(*h*) *Farrar v. North British Bank*, 6 July 1850, 12 D. 1190.

(*i*) *Antea*, p. 134.

been shown that the right of any bill or note made payable to a woman vests, on her marriage, in her husband, and that he then becomes alone entitled to indorse it (*a*). This doctrine, with its consequences, has been already illustrated. The right of an executor to indorse a bill or note belonging to the deceased, and the consequences of his indorsation, as well as that of any agent, whether indorsing in his own name or merely as agent, have been formerly explained (*b*). We have also considered the rights of the several parties to whom a bill or note is taken payable to transfer it, both when they are, and when they are not in partnership (*c*).

women, executors, agents, or partners.

SECTION II.

TIME AND MODE OF INDORSATION.

1. *Time of Indorsation.*

If an indorsation is dated, the date will, as already laid down (*d*), be probative, 'or at least *prima facie* evidence.' If it is not dated, its date will be presumed to be that of the bill (*e*). 'In England the presumption as to an undated indorsement does not seem to be more definite, than that it will be presumed to have been made before the bill became due (*f*); and it is left to the jury to ascertain the precise date from the circumstances of the transfer (*g*).'

Date of indorsation.

A bill may be indorsed before or after acceptance, and even while it is blank in everything but the drawer and indorser's name (*h*); 'or in everything but the acceptor's signature (*i*); or indeed when it is blank in all respects whatever (*k*). If a bill have

When indorsation competent.

(*a*) *Antea*, p. 140.

(*b*) *Antea*, p. 145, 147.

(*c*) *Antea*, p. 157.

(*d*) *Antea*, p. 36, 37.

(*e*) *Graham v. Leny*, 15 May 1794, Bell's Fol. Ca.; *Smith v. Home*, 5 Dec. 1712, M. 1502; 2 Bell's Comm. 185.

(*f*) *Lewis v. Parker*, 1836, 4 Ad. and El. 838; *Parkin v. Moon*, 1835, 7 C. and P. 408.

(*g*) *Anderson v. Weston*, 31 Jan. 1840, 9 L. J. (C. P.) 194.

(*h*) *Usher v. Dauncey*, 4 Camp. 97.

I.

(*i*) *Schultz v. Astley*, 1836, 5 L. J. (C. P.) 130.

(*k*) *Russell v. Langstaff*, 1781, 2 Doug. 514. The defendant, to accommodate G., indorsed five copperplate checks, made in the form of promissory notes, but in blank, no sum, date, or time of payment, being mentioned. G. filled them up as he thought fit, and plaintiff, who knew they were blank when indorsed, discounted them. Plaintiff recovered. *Per Mansfield*: "the indorsement on a blank note is

M

been issued post-dated, it may be indorsed before the date it bears has arrived (*a*). It has long been settled that a bill or note may be indorsed either before or after the term of payment (*b*). An indorsement after the term of payment has been assimilated to the drawing of a new bill payable at sight (*c*). A bill may be indorsed after it is protested for non-acceptance or non-payment (*d*); and, although it has been said that bills or notes cannot be indorsed after the protest is recorded (*e*), or summary diligence raised on it, yet the contrary is now established, the rule being that the bill or note may be still indorsed, but that the protest, with the decree of registration, or diligence following on it, is not transferred without assignation (*f*). ‘After a bill has been ranked on a sequestrated estate, it has been held that the right to draw dividends cannot be transferred by indorsation, but can only be assigned (*g*).’

Indorsation
after payment
by acceptor.

A bill, it has been said, “is negotiable *ad infinitum*, until it has been paid or discharged on behalf of the acceptor” (*h*). Bills or notes, when paid by the acceptor after the term of payment, are *functæ officio*, and cannot be re-issued, even to a *bona fide* onerous indorsee (*i*), excepting notes payable to the bearer on demand, for any sum not exceeding L.100, which may be re-issued after pay-

a letter of credit for an indefinite sum.”

(*a*) *Pasmore v. North*, 1811, 13 East. 516.

(*b*) *Elliot v. M'Kay*, 16 July 1777, M. 1648; *Robertson v. M'Glashan*, 6 Feb. 1787, M. 11129; *Crawford v. Robertson's Trustees*, 30 June 1814, F. C. In England, it was held to be settled in *Mutford v. Walcot*, 1 Raym. 574, where Holt, C. J., lays down the doctrine as supported by the general opinion of merchants and custom; and in *Dehers v. Heriot*, 1 Show. 163, and *Boehm v. Stirling*, 7 T. R. 430, the same thing is implied. With regard to bills for any sum exceeding 20s. and under L.5, see Acts cited p. 43.

(*c*) *Dehers v. Heriot*, 1 Show. 164. As to indorsations after the term of payment, see Sec. IV. of this chapter, where the law is fully stated.

(*d*) *M'Adam v. M'William*, 14 June 1787, M. 1613.

(*e*) Bankt. i. 13, 17; Ersk. iii. 2, 31.

(*f*) *Freer v. Richardson*, 18 June 1806, Morr. App. to Bill, No. 19, and Mr Bell's Note, vol. ii. p. 19; — v. —, 28 Nov. 1754, 5 Br. Sup. 820; *Brown v. Ralston*, 5 June 1793, H. 40.

(*g*) *Wallace v. Campbell*, 8 June 1821, 2 Sh. Ap. 467. When an assignation is required, and two transferences are embodied in one deed, care must be taken that the requisite number of stamps is used; *Oliver v. Haliburton*, 22 June 1822, 1 S. 519.

(*h*) *Per Ellenborough in Callow v. Lawrence*, 1814, 3 M. and S. 95.

(*i*) 55 Geo. III. c. 184, § 19. *Vide Holroyd v. Whitehead*, 1 Marsh. 128; also *Campbell v. Lawrie*, 14 Jan. 1830, 8 S. 310.

ment, if duly stamped at first (a). But a bill or note retired by another person than the acceptor, before it becomes due, and indorsed before that time to an onerous and *bona fide* holder, without a marking on it to indicate payment, has been found to afford a good claim to the indorsee (b). 'If the acceptor himself retire the bill before maturity, *for the purpose of discharging it*, the bill has, properly speaking, completed its functions, and ought not to be re-issued; but if it find its way into the circle again, an onerous holder, obtaining it while not overdue, can recover from the parties to it, provided he has not had notice of the fact of payment (c). And it has been held that the acceptor may even *discount* his own bill; and, as such a transaction is a fair and legitimate commercial transaction, he may again put the bill into the circle, and by indorsation pass to subsequent indorsees the same rights against the drawer and previous indorsers as if a third party had been the discounteer (d). Should he, however, after discounting the bill, retain it in his own hands till maturity, its office is then gone, and it cannot be re-issued on any terms (e).'

It has been held, that the drawer of a bill payable to his own order, or to the payee or indorsee of any bill or note, after indorsing it to a third party, may re-acquire it after paying it, by having his own and all the subsequent indorsements scored out, and may either use diligence or action on it against the previous parties, or indorse it to a third party, who will have the same right (f). If a bill drawn payable to a third party should be returned to the drawer on his paying it, it is extinguished as to the payee and all

Indorsation
after payment
by drawer, and
re-indorsation.

(a) *Ibid.* 55 Geo. III. c. 184, § 14, *antea*, p. 120 (on "Bank Notes").

(b) *Burridge v. Manners*, 3 Camp. 194; *Elsam v. Denny*, 12 June 1854, 23 L. J. (C. P.) 190.

(c) *Morley v. Culverwell*, 1840, 10 L. J. (Ex.) 35.

(d) *Attenborough v. Mackenzie*, 1856, 25 L. J. (Ex.) 244.

(e) *Harmerv. Steele*, 1849, 4 Exch. 1.

(f) *Adam v. Watson*, 13 Dec. 1827, 6 S. 244; *Russell v. Mather*, 27 Jan. 1824, 2 S. 648; *Fairholmes*, 7 Jan. 1752, M. 1475; *Hamilton v. Dalrymple*, 31 Jan. 1724, M. 1403; *Crawford*,

13 Jan. 1736, *Elchies v. Bill*, Nos. 9 and 10; *Sraiton v. Scott*, 16 Dec. 1743, *Elchies v. Bill*, No. 33; *Robertson v. Haliburton*, and another case cited by *Elchies*, No. 35, *v. Bill*.

In England, in *Callow v. Lawrence*, 1814, 3 M. and S. 97, the same point was settled, after full consideration, by the Court of K. B., who found that a bill made payable to the drawer, which had been returned on him by a posterior indorsee, and which, after all the intermediate indorsations were scored out, had been re-indorsed by him to a third party, afforded good ground of

subsequent parties. If the drawer is also payee, he may negotiate it after getting it back, like another payee. Nor does there appear to be any reason why the drawer, though not payee, should not acquire the bill by indorsement from a party vested with it, so as to convey it to third parties by his right as indorsee (a). But he could not maintain action on an indorsement in his favour, except against the acceptor, because, though he recovered from an indorsee, the latter might recover back from him in his character of drawer, and therefore the maxim would be applicable, *Frustra petis quod mox es restituturus*. On this principle it has been decided, that the payee and indorser of a note having got it indorsed to him by his indorsee, could not maintain action against the latter on the indorsement, since the defender might have sued him again for recourse as indorsee (b). Nor could his indorsee sue as such, unless against the acceptor; or, if his author's first signature was in the character of indorser, then against the parties whose names were prior to that signature, since his character of drawer or indorser is apparent *ex facie* of the bill or note, and therefore any person deriving right from him is held to be acquainted with it (c). 'It has

action to this indorsee against the acceptor.

(a) This seems to have been taken for granted in *the King v. Burn*, 5 Price, 179. The case itself depended on specialties. In *Louviere v. Lambray*, 10 Mod. Rep. 37, the Court of Queen's Bench decided, that the drawer of a bill might maintain action, as indorsee against the acceptor; holding, however, that it would be a good defence against such an action that the acceptor had not effects of the drawer in his hands.

(b) *Dickie v. Gutzmer*, 27 Feb. 1828, 6 S. D. 637; *Bishop v. Hayward*, 1791, 4 T. R. 470. In *Britten v. Webb*, 1824, 2 B. and Cr. 483, where the payees and first indorsers of a bill brought an action on it against a subsequent indorser, on the allegation, that the defendant had indorsed the bill to give it credit, and that therefore the plaintiffs were entitled to recover from

them, as the acceptors had not paid it, the Court of K. B. held, 1st, That the defendant could not be liable to the plaintiffs on the bill, because, though he paid it to him, he would be entitled, under the same document, to recover back its amount from him as a prior indorser; and, 2dly, That he could not recover under the alleged agreement, because, according to Bayley, J., being a verbal one, it could not be set up against a written contract, besides another ground, peculiar to the law of England, that there had been no consideration for it. *Vide also Carr v. Stephens*, 9 B. and Cr. 758.

(c) Where a re-indorser has had a bill indorsed to him without value, and makes his indorsation for value (as under a special agreement to interpose his security), it seems that the re-indorsee may sue him. *Morris v. Walker*, 1850, 15 Q. B. 589; *Wilders v. Stevens*, 1846, 15 M. and W. 208.

been laid down, that when an accommodation-bill has been paid by the drawer at maturity, it is extinguished, as having been paid by the proper debtor, and is not re-issuable under the Stamp Acts (a). This doctrine must be received with some hesitation, as it is a general rule that the liability of an instrument to stamp duty is to be judged of, not on latent objections, but by what appears *ex facie* of it; and the sounder view seems to be, that the indorsee of an accommodation-bill retired by the drawer at maturity, may sue the acceptor, unless it be competently proved that he was privy to the nature of the original transaction (b).'

2. Mode of Indorsement.

No form of words is necessary to an indorsement. The indorser's signature is generally sufficient (c); to which his residence ought to be added, if he is not generally known in the commercial world. His signature on the face of a bill or note will be as good an indorsement as on the back of it (d). But a private mark or number, without the indorser's signature, will not be a good indorsement (e). An indorsement in pencil is effectual (f).

Form of
indorsation.

When a person indorses a bill or note as agent for another, this should be expressed, either by signing "*per* procuration," or otherwise. It has been shown, that an agent who indorses bills or notes will be personally liable, unless he indorses expressly as agent. The usual mode of doing this, is to indorse "without recourse," by which any claim against him is excluded.

An indorsement, when it mentions the indorsee's name, is a full indorsement, and otherwise, is called a blank indorsement. It was

Indorsations
either blank or
special.

(a) *Lazarus v. Cowie*, 1842, 3 Q. B. 459.

(b) *Jewell v. Parr*, 1853, 13 C. B. 909, (in error) 16 C. B. 684.

(c) *Pinkney v. Hall*, 1 Raym. 176; *East v. Essington*, 2 Raym. 811; *Lambert v. Oakes*, 12 Mod. 244.

(d) *Young v. Glover*, 1857, 21 Eng. Jur. 637. In *Yarborough v. The Bank of England*, 16 East. 12, Lord Ellenborough refers to the case of *Rex v. Bigg*, 1 Str. 17, 18, where a person being charged with having erased the indorsement on a note, was found

guilty, although the words erased were on the *face* of the note, they being held, notwithstanding, to have the legal effect of an indorsement.

(e) In *Fenn v. Harrison*, 3 T. R. 760, it was held not sufficient to subject a person as indorser of a bill, that his number was on it, although he was made liable on other grounds. The same doctrine is implied in two cases cited, in *ex parte Shuttleworth*, 3 Ves. 368.

(f) *Geary v. Physic*, 5 B. and Cr. 234; 7 D. and R. 653.

held, at one time, in England, that the right under a blank indorsement was not complete till the holder filled it up with an order to pay the contents to himself (*a*), and that, till then, he could only sue in the indorser's name. But it is now settled, that such an indorsement makes a bill or note payable to the bearer (*b*). If the payee indorses a bill or note blank, and the subsequent indorsements on it are special, any holder, though he has no right under them, may delete them, and sue the payee, drawer, and acceptor, under the payee's blank indorsement. For this indorsement, while blank, is a warrant to pay to the bearer; and no subsequent indorsements, which are only additional obligations, can restrict its efficacy, this being done only by filling it up as a special indorsement (*c*). Any other blank indorsement, by a party in right to a bill or note, will give the holder a similar claim against the indorser and all the previous parties.

Blank indorsation.

The holder of a bill or note under a blank indorsement may fill up the indorsement as he pleases, either with a special indorsement, or a discharge to the debtor (*d*). It may likewise be filled up in favour of any number of parties who choose to sue on it together, though they should not be in partnership; or they may sue upon it as holders, without a special indorsement (*e*). But in a case where a bill had been given to a company blank indorsed, and two

(*a*) *Clark v. Pigot*, 12 Mod. Rep. 192, *per* Holt, C. J.

(*b*) In *Peacock v. Rhodes*, Dougl. 611-33, it was decided, after full consideration, that the plaintiff having given value for a bill blank indorsed, which had been stolen from a former holder, and had been indorsed to the plaintiff for value by a third person, was entitled to recover on it against the drawer, on the drawee refusing acceptance. *Vide* also opinion of Buller, J., as to the effect of a blank indorsement, cited in *Newsome v. Thornton*, 6 East. 21-2.

(*c*) This point was decided in an action against the acceptor, in *Smith v. Clarke*, Peake, 225, Esp. 180, and was implied in *Chaters v. Bell*, 4 Esp. 210; *Walker v. Macdonald*, 3 June 1848, 17 L. J. (Ex.) 377.

(*d*) Selwyn's N. P. 345, 5th edit.

(*e*) In *Ord v. Portal*, 3 Camp. 239, where the parties, assignees of a bankrupt to whom a bill had been given blank indorsed, in payment of a debt, sued the acceptor, Lord Ellenborough sustained their title; holding, that "the indorsement in blank conveys a joint right of action to as many as agree in suing upon the bill." A similar decision was given by Lord Ellenborough in *Rordansz v. Leach*, 1 Stark. 446, and by Best, C. J., in *Low v. Copestake*, 3 C. and Pay. 300, where three parties, not partners, who had indorsed a bill separately, had it in equal shares, and then struck out their several indorsements, and sued the previous indorser on his blank indorsement. *Vide* also *Attwood v. Rottenbury*, 6 Moore, 579.

partners of the company afterwards brought an action on it, with a third party who was not a partner, it was held that this third party could have no title, unless the company had indorsed, or, at least, had delivered the bill to him (*a*). In Scotland, such delivery would probably have been presumed, and the bill, being blank indorsed, would have been thus held to pass without a new indorsement. A person filling up a blank indorsement does not thereby become liable for the bill or note, unless his name be on it, because the words filled up relate only to the indorser's signature (*b*).

Such being the effect of a blank indorsement, it is often advisable to fill it up, so as to prevent payment from being received by a stranger, if the document is lost or stolen (*c*). This is done by prefixing to the indorser's signature the words "Pay to Mr A. B. or order," or "Pay to Mr A. B.,"—the words "or order" in an indorsement not being required, even in England, to render the bill or note indorsable, provided it has been granted at first to the payee "or order" (*d*). In Scotland, it has been shown that these words are not necessary in any case (*e*). A full indorsement prevents the bill or note from being indorsed by any but the indorsee (*f*). A special indorsee does not transfer the bill or note by merely delivering it, without indorsing his name, although, when it has been so delivered for value, the holder may insist that it should be indorsed (*g*). In England, such an indorsement is good, though

Special indorsation.

(*a*) *Machell v. Kinnear*, 1 Stark. 499.

(*b*) In *Vincent v. Horlock*, 1808, 1 Camp. 442, Lord Ellenborough nonsuited the plaintiff, on this ground, in an action brought against a company as indorsers of a bill, in respect that one of their partners had filled up a blank indorsement with the plaintiff's name. The doctrine in the text was also laid down by the Lord Chancellor in *ex parte Isbister*, 1 Rose's Bank. Cas. 20; *Fairclough v. Pavia*, 19 April 1854, 23 L. J. (Ex.) 215.

(*c*) *Beawes*, No. 178.

(*d*) *Moore v. Manning*, Comyn's Reports 311, cited also in Selwyn's N. P. 346. In *Acheson v. Fountain*, 1 Str. 557, where a bill was declared on as indorsed to a certain person, "or

order," and turned out to be indorsed to her without the words "or order," the Court held the indorsement to be the same in legal effect as if it had these words, and therefore sustained the declaration. The same point was decided on full consideration by Lord Mansfield and the Court of King's Bench in *Edie v. The East India Company*, 1761, 2 Burr. 1216, the Court founding on the two preceding cases as settling the law.

(*e*) *Antea*, p. 52.

(*f*) This doctrine is implied in *Mead v. Young*, 1790, 4 T. R. 28; as also in *Potts v. Read*, 6 Esp. 57, and in the cases cited note *d*.

(*g*) *Cunliffe v. Whitehead*, 31 May 1837, 6 L. J. (C. P.) 255.

made after the indorser has committed an act of bankruptcy ; or, if not made till his assignees have taken up the estate, they will be ordained to make it, as they hold the estate subject to all equitable claims connected with it which could be enforced against the bankrupt (a).

Partial indorsement.

After part of a bill or note has been paid, it may be indorsed for the residue (b). But there cannot be two indorsements for distinct portions of the sum in a bill or note, as the acceptor is not bound to allow two separate actions on the same contract (c), unless he has accepted after such divided indorsements ; in which case, it is said that he undertakes to pay the bill agreeably to them (d). But the drawer and indorsers, previous to his acceptance, will not be so bound by it. It may be doubted, whether these divided indorsements, as they form distinct obligations, can be valid in terms of the Stamp Acts, if written only on one stamp. ‘ In America it has been held, where a person had first had a part of a bill and then the remainder indorsed to him, that these two bad indorsations were not equivalent to one good one (e).’

Restrictive indorsation.

The creditor in a bill or note may make a restrictive indorsement, *e.g.* by indorsing it to a certain person for his use (f), which will not only prevent the indorsee, in general, from indorsing, but will make him the indorser’s mandatory, whose mandate can be recalled at pleasure (g). It would appear, however, that such an indorsee may discount the bill, since the money drawn by him on

(a) *Smith v. Pickering*, Peake, 50, Anon. 1 Camp. 49 ; *Greening ex parte*, 13 Vesey, 206 ; *Mowbray ex parte*, 2 Jacob and Walker, 428. See *postea*, p. 185 : “ Accidental omission of indorsation.”

(b) This doctrine was recognised in *Hawkins v. Cardy*, 1 Raym. 360, though held inapplicable to the particular case.

(c) In *Hawkins v. Cardy*, note b, the declaration was held to be bad on this ground, as it claimed part of a bill, without stating that the rest had been paid, in consequence of which the defendant might have been liable to a separate action for it. The same

doctrine was laid down in *Hawkins v. Gardner*, 12 Mod. Rep. 213 ; as also in *Johnson v. Kennion*, 2 Wils. 262 (*vide* opinion of Gould, J.), although the report of that case, so far as it regards its particular circumstances, is said to be inaccurate by Wilson, J., in *Bacon v. Searles*, 1 H. Bl. 88 ; *Jones v. Broadhurst* (*per* Creswell), 1850, 9 C. B. 173.

(d) Beawes, No. 266.

(e) *Hughes v. Kiddal*, Bayley (Amer. Ed.) 72, quoted Chitty, 166.

(f) *Per* Lord Hardwicke in *Snee v. Prescott*, 1 Atk. 249.

(g) Pothier, Nos. 89, 90 ; Beawes, No. 219 ; Marius, 72.

discounting it will be held to have been received for his constituent's behoof. 'But if the discounter apply the proceeds to the use of the indorsee, and not of the indorser, he will have to refund them to the latter (a).' He may likewise indorse the bill or note "payable to J. S. only," which will prevent J. S. from indorsing, or he may desire that the amount should be "credited to the account of J. S.," which has been found to imply merely a personal credit in his favour, without power to indorse (b). An indorsement which desires absolutely that payment should be made to a certain person, though stating that it was in part of a specified consideration in a deed by him to the indorsers, is not restrictive, the statement regarding the consideration being accounted surplusage; 'and, in general, wherever the meaning of the indorsement is doubtful, the presumption will be against restriction (c).'

An indorsement may also be conditional, so that the indorsee shall have right to payment only if the condition be performed, while, otherwise, the right will revert to the indorser (d). The constitution of a bill or note cannot, as already mentioned, be made to depend on a contingency; but this rule does not apply to its transmission. 'Parole evidence will not be admitted for the purpose of imposing a condition not embodied in the indorsement (e).'

Conditional
indorsation.

Delivery of the bill or note is necessary, as already mentioned, to complete the indorsee's right; and, when it has been made to an onerous and *bona fide* holder, the indorsation cannot be recalled. Till then, it is revocable (f).

Indorsation
completed by
delivery.

(a) In *Lloyd v. Sigourney*, 1828, 5 Bing. 525, an indorsement, "Pay to S. W. or his order, for my use," was decided by the Exchequer Chamber (affirming a judgment of the King's Bench) to be a restrictive indorsement; and the words "or order," added to it, were held to mean, merely, that the indorsee might employ a third party to draw the money for him, though still for the indorsee's use.

(b) *Anchor v. The Bank of England*, 2 Dougl. 637.

(c) Decided by Lord Ellenborough in *Potts v. Read*, 6 Esp. 57. The same rule is applied in *Hausouillier v.*

Hartinsk, 7 T. R. 733; *Treuttel v. Barandon*, 1817, 8 Taunt. 100.

(d) *Robertson v. Kensington*, 22 June 1811, 4 Taunt. 30. In this case, a bill having been indorsed payable to a person on the occurrence of a certain event, and there being also several subsequent indorsements, the acceptors, who had paid it to a holder before the condition of the first indorsement was performed, were found liable in second payment to the first indorser.

(e) *Soarez v. Glyn*, 1845, 14 L. J. (Q. B.) 313.

(f) *Antea*, 90, 91.

Accidental omission or deletion of indorsation.

‘ If a bill, payable to order, have been delivered over for a valuable consideration, but indorsation have been accidentally omitted, the holder has an action to compel the deliverer to indorse (*a*). The deliverer may indorse, even after an intervening bankruptcy (*b*); or, in that event, his assignees may be compelled to indorse (*c*), they having liberty, however, to make the indorsement without recourse against themselves personally (*d*); and if the deliverer have died, his executors may write the indorsation (*e*). Till the indorsement is complete, the holder has only an equitable title to the bill, and cannot sue the acceptors or previous parties, even when offering ample indemnity (*f*). For the same reason, he is liable then to all the exceptions pleadable against the deliverer; and if, between the delivery and the indorsation, he become aware that the deliverer fraudulently acquired the bill, he cannot recover (*g*).’ It has been held, that the erasure of an indorsement or acceptance through the mistake of a third party does not release the indorser or acceptor (*h*). In Scotland, he could not, in such a case, be liable to summary diligence, though he might be liable to an action.

SECTION III.

EFFECT OF INDORSEMENT.

1. *The Indorser's Obligations.*

Nature of indorser's obligations.

It has been said that the indorser is a new drawer on the original drawee (*i*). He is therefore liable to be sued immediately, if

(*a*) *Rose v. Sims*, 1830, 1 B. and Ad. 521.

(*b*) *Smith v. Pickering*, 1791, Peake, 50.

(*c*) *Greening*, 1806, 13 Ves. 206.

(*d*) *Mowbray*, 1820, 1 Jac. and Walk. 428.

(*e*) *Watkins v. Maule*, 1820, 2 Jac. and Walk. 237.

(*f*) *Harrop v. Fisher*, 3 May 1861, 30 L. J. (C. P.) 283.

(*g*) *Whistler v. Foster*, 24 April 1863, 32 L. J. (C. P.) 161.

(*h*) *Warwick v. Rogers*, 1843, 5 M. and Gr. 340; *Wilkinson v. Johnson*, 5 D. and R. 403, 3 B. and Cr. 428; *Novelli v. Rossi*, 2 B. and Ad. 757; *Dott v. Mackenzie*, 18 July 1861, 23 D. 1310.

(*i*) Per Lord Mansfield in *Heylin v. Adamson*, 1758, 2 Burr. 669. Vide also *Haly v. Lane*, 2 Atk. 182; *Hill v. Lewis*, 1 Salk. 133; *Smallwood v. Vernon*, 1 Str. 478; *Ballingalls v. Gloster*, 1803, 3 East. 481. The same principle has been recognised in a number of other cases.

the drawee refuse to accept (*a*), and is subject to the same claims of recourse as the drawer. He is also discharged, like the drawer, by the holder's failure to negotiate the bill or note (*b*). But he cannot be liable to the acceptor, as he is proper debtor in the bill, unless when a person accepts for the indorser's honour (*c*). The nature of this kind of acceptance shall be afterwards considered. 'The indorsement of a bill of exchange implies an undertaking that the bill may again be indorsed according to its tenor (*d*); that the acceptance and preceding indorsations were made by competent parties, and are genuine (*e*); and that if the bill be not paid by the drawee after due negotiation, and due notice be given of the failure, he will pay it himself (*f*).'

The holder of a bill or note, however, will not be liable for it, if he delivers it without indorsement, not for any debt, but by way of sale (*g*), or in exchange for another bill (*h*). 'But in that case he

(*a*) This was decided by the Court of K. B. in *Ballingalls v. Gloster*, 4 Esp. 268, and 3 East. 481, expressly on the ground that an indorser was liable in all respects as a new drawer. For the drawer's liability in case of the drawee's refusal to accept, *vide* 162 *et seq.*

(*b*) *Per* Lord Ellenborough in *Ballingalls v. Gloster*, note *a*.

(*c*) Both the doctrine mentioned in the text and the exception to it are very clearly explained by Pothier, No. 111-12.

(*d*) Story, § 108.

(*e*) Story, § 110, 111. *M'Gregor v. Rhodes*, 25 April 1856, 25 L. J. (Q. B.) 318. In this case the defendant, to whom the bill bore to be indorsed by the drawer, had indorsed to the plaintiff; but on being sued by the latter, he pleaded that the drawer did not indorse to him. Held that the plea was bad, as raising an immaterial issue.

(*f*) Story, § 112; Chitty, 172.

(*g*) In *Fydell v. Clark*, 1 Esp. 447, Lord Kenyon assoilzied the defendants from a claim for certain bills, which they had given without indorsement in part of other bills which they were discounting, holding that they had thus

refused to pledge their credit to the bills so given. In *The Bank of England v. Newman*, 1 Raym. 442, Holt, C. J., lays it down that such a transaction is a plain sale of the bill. This doctrine was also laid down in similar circumstances by the Lord Chancellor in *ex parte Shuttleworth*, 3 Ves. 368, where his Lordship rejected, on that ground, a claim made against an estate, on a bill which the bankrupt had given for cash to the claimant without indorsing it, being, indeed, requested by the claimant not to indorse it. The same doctrine is implied in the Lord Chancellor's decision in the case of *Kirby ex parte*, 1 Buck's Cas. Bank. 511, where a person having given away for present value, without indorsing it, a bill indorsed in name of a house of which he was a partner, the holder was found not entitled to rank on his individual estate, but only on that of the company.

(*h*) In *Hornblower v. Proud*, 2 B. and A. 327, where three bills had been exchanged for another bill, the Court of K. B. refused to allow trover for restitution of these bills, on the bill given in exchange for them turning out bad.

is held to warrant that the bill is what it bears to be; and if it turn out to be something different, he will have to refund the consideration which he received on the transference. He will be liable in this way, if, for example, the bill turn out to be void from some defects (not apparent *ex facie*), such as non-compliance with Stamp Acts (*a*), alterations (*b*), or forgeries (*c*).'

How discharged.

An indorser is discharged on payment by any preceding party to the bill or note (*d*), his obligation being so far subsidiary to theirs, that he would have recourse against them, if he were obliged to pay it. With reference to them, he is indorsee, and consequently creditor; or, if the bill or note has been indorsed by him to another party who obliges him to pay it, he is to the prior parties as a cautioner to the principal debtors. It has been held in England, that a person indorsing a bill by way of accommodation, which the acceptor had subscribed on the same footing, has a claim, if obliged to pay it, against the acceptor as debtor *ex facie* of the bill (*e*). But whether this doctrine applies, when the indorser knew that the acceptor signed, like himself, for accommodation, shall be afterwards considered. The ways in which the indorser may be discharged by failure in due negotiation, shall likewise be afterwards considered.

2. Indorsee's Claim against Acceptor.

Nature of indorsee's right to bill, and his powers over it.

The holder's claim for payment, by virtue of indorsation, against the acceptor, or any of the other parties, is not in general affected even by exceptions pleadable against his indorser (*f*). 'An indorsee who receives a bill, without any express limitation as to how

(*a*) *Gompertz v. Bartlett*, 1853, 2 E. and B. 849. In this case the bill was unstamped, and bore to be drawn abroad; but having really been drawn in London, was (prior to 17 & 18 Vict. c. 3, § 4) null under the Stamp Acts. In *Young v. Cole*, 1837, 3 Bing. N. C., the documents transferred were Guatemala bonds, and were not recognised by the government of that country in consequence of some neglect to get them stamped in proper time.

(*b*) *Jones v. Ryde*, 1814, 5 Taunt. 489; *Bruce*, *ib.* 495.

(*c*) *Gurney v. Womersley* (acceptance forged), 1854, 4 E. and B. 133; *Fuller v. Smith* (drawer and acceptor's signatures forged), Ry. and Moo. 49.

(*d*) *Hull v. Pitfield*, 1 Wils. 46.

(*e*) This doctrine was implied in *Houle v. Baxter*, 3 East. 177. The application of it to the circumstances of that case turned on matters peculiar to English law, which it is not necessary to state.

(*f*) *Adam v. Watson*, 13 Dec. 1827, 6 S. 244.

he is to hold it, may, as he pleases, either discount, and take it in payment of a debt due to him by the indorser, or hold it as security for such a debt (*a*). If a bank receive a bill on the express condition that they are to discount it, they must either do so or return it (*b*); but if they receive it without any such condition (*c*), or intimate on receiving the bill that they will not comply with the condition, and that be acquiesced in (*d*), they may retain the bill, as security for prior advances. Of course, if the holder receive a bill for a special purpose, he must comply with it (*e*); but with us, proof that he held under any limited title, could be only by writ or oath (*f*). An indorsee, before doing summary diligence against an acceptor, is not bound to assign to him securities which he may hold from the drawer for the due payment of the bill (*g*).'

An indorsee, 'before the term of payment (*h*),' is not affected by previous receipts for payments, whether partial or total, which do not appear *ex facie* of the bill or note (*i*). In England it has been decided that an indorsee, before the term of payment, is not affected even by payment of the whole bill, made before that term by a different person from the acceptor, if it does not appear on the bill (*k*).

Indorsee not affected by previous receipts,

It has been decided (*l*), that the claim of an onerous indorsee,

nor by declarations of the drawer,

(*a*) *Black v. Melrose*, 29 Feb. 1840, 2 D. 706. See also *Kilgour v. Braid*, 18 Dec. 1800, H. 44.

(*b*) *Haig v. Buchanan*, 20 June 1823, 2 S. 412; *Mathieson v. Anderson*, 12 June 1822, 1 S. 486.

(*c*) *Strathearn v. Masterman*, 25 June 1850, 12 D. 1087; *Glen v. National Bank*, 14 Dec. 1849, 12 D. 353.

(*d*) *Stewart v. Wyllie*, 9 June 1849, 11 D. 1123.

(*e*) *Delauny v. Mitchell*, 1816, 1 Sta. 429; *Evans v. Kymer*, 1830, 1 B. and Ad. 528.

(*f*) *Glen v. National Bank*, note c.

(*g*) *Cowan v. Hurry*, 19 Dec. 1816, F. C.

(*h*) 19 & 20 Vict. c. 60, § 16.

(*i*) *Erskine v. Thomson*, 12 Dec.

1711, M. 1501; *Fairholm v. Cockburn*, 24 July 1714, M. 1506.

(*k*) *Burbridge v. Manners*, 3 Camp. 194. The same point was ruled with regard to a partial payment by Lord Kenyon in *Cooper v. Davies*, 1 Esp. 463.

(*l*) *Shaw v. Broom*, 4 D. and R. 730. In this case, another decision, *Benson v. Marshall*, was cited, whereby the contrary was said to have been found by Holroyd, J. But the bill had been indorsed, in that case, after it was due, so that, according to the rule established in England, it was no longer negotiable; and as the acceptor, by that time, owed nothing to the indorser, his indorsee was held liable to the same exceptions which were pleadable against him.

who acquired a bill before it fell due, against the acceptor, could not be affected by a declaration of the drawer after indorsing it, that it was accepted for his accommodation. A similar decision was given (*a*), in an action by the holder of a bill payable on demand; the Court of King's Bench being of opinion, that it could not be held overdue, as there was no evidence of its being presented for payment, and that, consequently, the holder, who appeared to have given value for it, could not be affected by the declaration of a prior holder. The contrary was ruled in a case (*b*), in which the indorsee was held to act merely as agent for the indorser, the declarations of the latter, while he held the bill, being received as evidence. In a subsequent case (*c*), one of the decisions now cited was recognised as having proceeded on this principle (*d*). The same thing has been held as to a release by the drawer of a bill, before he indorsed it, to the acceptor, when pleaded against the indorsee, who was ignorant of it (*e*).

nor by claims
of compensa-
tion, or other
exceptions,

The holder's claim for payment is not affected in general by pleas of compensation, not appearing from the bill or note, to which previous indorsers might be liable (*f*); or, indeed, by any counter obligation entered into with him, which does not appear from the bill or note (*g*). Thus the Court held, that an assignee of a bill was entitled to make his payment good against the acceptors, notwithstanding a back-letter to them by the drawer and original payee of the same date with the bill, in so far as regarded his own prior debts, in security of which the bill had been assigned; but that he could not do so with regard to the debts of other creditors of the indorser, in security of which the bill had been likewise assigned to him as their trustee (*h*). It appears from the session papers, that

(*a*) *Barough v. White*, 4 B. and Cr. 325; 2 C. and Pay. 9; also 6 D. and R. 379.

(*b*) *Welstead v. Levy*, 2 M. and Malk. 138.

(*c*) *Smith v. De Witz*, 1820, 6 D. and R. 120.

(*d*) *Shaw v. Broom*, 189, note *l*.

(*e*) *Dod v. Edwards*, 1827, 2 C. and Pay. 602.

(*f*) *Stuart v. Campbell*, 31 Jan. 1699, M. 1497; *Tudhope v. Turnbull*, 22

June 1748, M. 1510; *Scougal v. Ker*, 24 Feb. 1764, M. 1407; *Thistle Bank v. M'Kay*, 20 Dec. 1774, M. 1601; *M'Gilchrist v. M'Arthur*, 16 Jan. 1794, M. 877; *Herries v. Crosbie*, 22 Feb. 1775, M. 2577; *Arthur v. Cockburn*, 18 Nov. 1701, Forbes, 164.

(*g*) *Bruce v. Guthrie*, 6 Dec. 1748, M. 1514.

(*h*) *Douglas v. Elliot*, 7 Jan. 1757, M. 1515. See also *Thomson v Coltril*, 1 Feb. 1749, M. 1632.

he had a right to the bill at first, by an indorsation, but that the bills in security of which it was indorsed being paid, he came under new engagements on the faith of it; and also got an assignation to it in security of his claims, and in trust for other creditors. The Court found his right effectual for his own claims; but repelled it as in trust for others. Perhaps they may have held, that, as his only right for them was the assignation, he was, as assignee, liable to the exceptions of his author. But it may be doubted, whether the assignation, if completed, should have been limited by any obligation between the acceptors and the former holder, which was not directly restrictive of the right.

A holder will be liable to the same exceptions with his indorser, if the exceptions arose from a contract or transaction to which they were both privy (*a*), 'or if he took the bill *in mala fide*' (*b*), or if he knew that the indorser had no good right to the bill (*c*), in which case he can make no claim, though his onerous indorsee may. In a case (*d*), where a company in whose favour a bill had been accepted by two persons jointly, and who had arrested the funds of one of the acceptors in security of it, knew that the other acceptor was a cautioner, this knowledge was held to excuse them from assigning the bill to a party who had another bill from the principal debtor alone, and who had used arrestments posterior to them on the funds belonging to the principal debtor. It was pleaded successfully, that, as the bill granted to the first arrestors was extinguished by their preferable arrestment of funds belonging to the principal debtor, the other acceptor's obligation to them, being merely

unless he was
made privy to
them,

(*a*) *Boyes v. Shaw*, 5 June 1707, Morr. 1500; *British Linen Co. v. Suter*, 18 Nov. 1824, 3 S. 294; *M'Donald v. Langton*, 23 Dec. 1836, 15 S. 303; *Goodall v. Ray*, 1835, 4 Dowl. P. C. 76.

(*b*) *Corrie v. Aitken*, 27 July 1785, M. 1520; *Hatch v. Searles*, 18 Nov. 1854, 24 L. J. (Ch.) 22; *Martin v. Morgan*, 5 Moore, 635.

(*c*) *Lovel v. Martin*, 1813, 4 Taunt. 799. The plaintiff in this case having lost the bill, and the defendants (bankers), at whose house it was made payable, having, after they knew this fact, discounted it to a third party

(the plaintiff having indorsed it before he lost it), and then given it up to the drawer, who was their customer, as a voucher for which they took credit in their account with him, it was unanimously held by the Court of Common Pleas, not only that they must lose the amount of the bill, but that they were liable in trover for it to the plaintiff. Compare *Symonds v. Atkinson*, 1 H. and N. 146, where, in the absence of notice of fraud, the holder's title was sustained.

(*d*) *Miller v. Baird and Gray*, 24 Nov. 1749, Morr. 12721.

a cautionary obligation, was extinguished, and that, as they were aware of its limited nature, they could not be bound to keep it up by assigning it to a third party. In another case (*a*), where a marking had been made on a bill, bearing that another bill had been drawn on the acceptor for the same sum, it was found, on the drawee of the second bill refusing acceptance, that the first, notwithstanding the marking, might be indorsed, so as to give the indorsee a claim against the drawee under his acceptance of it. The claim against the drawee under the first bill remained entire, on his refusing to accept the second bill, which was only a substitute for it. In an English case (*b*), it has been held that markings on a bill, indicative of some separate transaction between the previous parties to it, bind the indorsee to inquire into the particulars of the transaction, before taking the bill. But a general release by the drawer to the acceptor, before indorsement, does not affect the indorsee, unless he is privy to it (*c*).

It has been decided in England (*d*), that, when a bill is indorsed, after acceptance has been refused, but before the term of payment, and the indorsee, not aware of the non-acceptance, presents it again, and negotiates it duly, he will have a good claim on it against the previous parties. The bill is held, in that case, to be negotiable, as there is nothing on it which indicates its dishonour.

or bill bear
marks of dis-
honour.

If the holder of a bill has notice of its non-acceptance at the time of taking it,—which will be held to be the case if it is then noted for non-acceptance,—although indorsed to him before the term of payment, his right will be restricted, even by a private agreement regarding the bill between his indorser and any previous party (*e*). In a case (*f*), in Scotland, where a party had taken up a bill after it was protested, and got an assignation to the protest, the Court, proceeding partly, however, on certain written evidence which had been recovered, held that he was a mere agent for the

(*a*) *Mitchell v. Brown*, 8 July 1714, Morr. 1467.

(*b*) *Gascoyne v. Smith*, 1825, 1 M'L. and Yo. 348.

(*c*) *Dod v. Edwards*, 1827, 2 C. and Pay. 602.

(*d*) *O'Keefe v. Dun*, 1815, 1 Marsh, 613, 6 Taunt. 305.

(*e*) This was one of the points decided in *Crossly v. Ham*, 1811, 13 East. 498; *Brown v. Davis*, 1789, 3 T. R. 82.

(*f*) *Ritchie v. M'Kay*, 29 May 1823, 2 S. 349, 7 March 1826, 4 S. 534.

previous holder, and was not entitled to the privileges of a *bona fide* onerous indorsee. It would appear that they decided on a similar ground, in passing without caution a suspension of a charge on a bill which, before coming into the charger's hands, was retired by a party for whose accommodation the suspender had subscribed it, the payment being acknowledged by a receipt which appeared on the protest (*a*). There is nothing contrary to this rule in one case (*b*), which is noticed, lest it should be misunderstood; for, 1st, Although the bill, in that case, was protested, and diligence raised on it before the holder had got it, it is not said that these facts appeared *ex facie* of the bill, or were otherwise known to him; and 2^{dly}, The exception there pleaded was applicable only to the drawer and payee, and the bill, before it became due, or was dishonoured, had been conveyed onerously from him to a third party, through whom the holder derived right, so that the latter was not liable to any such exception. There is a later case (*c*), which appears, at first sight, to involve a decision that the holder was entitled, under similar circumstances, to the privileges of an onerous indorsee. But the decision proceeded on the ground of a previous *res judicata*, and it does not appear whether the question was argued before the first decision. In another case (*d*), where a bill, after being taken up by the drawer, had been delivered by him to a debtor of his, for whose accommodation it had been accepted, and by him indorsed in security of a debt to another bank, the Court, proceeding chiefly, as appears, on the ground that the bank should have held the bill to be an extinguished document, from its being marked as previously discounted, and not being indorsed by the former discounters, decided that they could not maintain action on it as onerous holders against the acceptor. Whether the mere circumstance of its being formerly discounted precluded the pursuers *per se* from taking it as onerous indorsees may be doubted.

(*a*) *Ramsay v. Aitken*, 26 Jan. 1826, 4 S. 390. *Vide* also *M'Gowan v. M'Kellar*, 24 Feb. 1826, 4 S. 498, *per* Lord Balgray; and also, for a case of real evidence of agency arising from the admitted facts of the case, *Farquhar v. Sloan*, 2 Dec. 1830, 9 S. 112, and 23 Jan. 1834, 12 S. 327.

(*b*) *Drew v. Paterson*, 2 Dec. 1825, 4 S. 259.

(*c*) *Pattison v. Campbell*, 17 Jan. 1827, 5 S. 208.

(*d*) *Smith v. Murdoch*, 28 May 1829, 7 S. 670.

3. *Transference of Funds.*

Indorsation transfers the drawer's funds in the drawee's hands to the indorsee;

Indorsement transfers the drawer's money in the drawee's hands to the amount of the bill or note to the indorsee, or to the holder in a blank indorsement. It has been shown (a) that the effect of drawing a bill is to convey these funds to the payee, and an indorsement is a transference of the payee's right. If the bill is accepted, no intimation of the indorsement to the drawee is necessary to complete the transference. By accepting, he has admitted funds of the drawer in his hands to the amount of the bill; and it has been held in England, that, after thus engaging to pay its amount to the payee or his indorsee, he cannot afterwards qualify his engagement by the condition that he shall have notice of the indorsement (b). If the bill is indorsed before acceptance, the transference will be completed by its presentment to the drawee, as proved either by his acceptance, or otherwise as already explained (a).

The effect of indorsement, in transferring the payee's right to the drawer's funds, is the same with that of drawing the bill in transferring them to the payee (c). If the bill has been accepted before it is indorsed, or the payee, before indorsement, has intimated it to the drawee by presentment or otherwise, the drawer's funds in the drawee's hands are thenceforth transferred by the bill to him or his order, so that an indorsement by him carries them to the indorsee without new intimation, against an intervening arrestment by the payee's creditors. The same right is carried by every new indorsement to the indorsee or holder, in preference to diligence by the payee's creditors or those of any previous indorser.

And arrestment does not prevent the transference.

'It has long been settled that a *bona fide* onerous indorsee cannot be affected by an arrestment used in the hands of the acceptor for a debt due to a drawer, or other previous holder (d). And where a bill has been transferred to an indorsee for a particular purpose (e), or on such terms as to leave a debt due by him to his

(a) *Antea*, 104.

(b) This was the chief ground of decision in *Reynolds v. Davies*, 1 Bos. and Pull. 628, in which the rule was settled as laid down in the text.

(c) *Antea*, 104 *et seq.*

(d) Admitted in *Forbes v. Innes*, 2 Feb. 1739, M. 712.

(e) *Dick v. Goodall*, 1 June 1815, F. C.; *Carmichel v. Mossman*, 27 June 1742, M. 740, 2791.

indorser (*a*), it has been held that an arrestment of the bill in his hands is not the proper way to attach his obligation to account or pay to the indorser. In this case, it is said that the proper course is to arrest the debt in the bill in the hands of the acceptor, and to raise against the holder an action of exhibition of the bill (*b*), applying likewise summarily to the Court to take the document into its custody by sequestration (*c*). The principle ruling these cases, is that an arrestment of bills is not competent (*d*). But where a party is under a general obligation to account to another for a sum to be received from a third party, the fact of his having taken a bill for it does not interfere with the power of a creditor to arrest the debt in his hands (*e*). Though it is admittedly competent to arrest in the acceptor's hands for a debt due by the holder, this will not have the effect of stopping the negotiability of the bill, except to the extent of preventing a party from recovering, who knew of the arrestment, and became indorsee for the purpose of defeating it (*f*).'

4. *Indorsee's presumed Onerosity and bona fides.*

The several rights belonging to the indorsee or holder of a bill or note, are founded on the presumption that he has obtained right to it *bona fide* and for value, which cannot in general be redargued unless by his writ or oath. This rule, with its modifications, has been already partly explained (*g*). It is only necessary to notice some other cases, applicable peculiarly to indorsees, which further illustrate the doctrines stated.

Presumption of
onerosity and
bona fides.

(*a*) *Haddow v. Campbell*, 7 Dec. 1796, M. 763.

(*b*) *Jameson v. Leckie*, Dec. 1729, M. 7117. In peculiar circumstances, the Court granted interdict to prevent the holder of bills of lading from negotiating them; *Anderson v. M'Nair*, 14 Jan. 1859, 21 D. 257.

(*c*) *Dalrymple v. Ross*, 18 Nov. 1737, M. 4819.

(*d*) 2 Bell's Comm. 71; Erskine, 3, 6, 7.

(*e*) *Lothian v. M'Cree*, 27 Nov. 1828, 7 S. 72; see also *Gordon's Creditors v. Innes*, 15 Jan. 1740, M. 715.

(*f*) See *M'Aul v. Logan*, June 1728,

M. 1694; *Cowan v. Douglas*, Forbes 164. In the former edition of this work, pages 290 to 296, there is a full examination of the history of the question treated in this paragraph.

(*g*) *Antea*, 54 *et seq.*, on "Consideration." "I have always understood that an indorsement must be taken *prima facie* to have been given for value, and that the proof, at least of circumstances tending to throw suspicion on such indorsement, lies on the party disputing its validity before the indorsee can be called upon to prove that he gave value for the bill." *Per Parke*, in *Heath v. Sansom*, 1831, 2 B. and A. 291.

Case of
indorsee con-
junct with
acceptor, or
with accommo-
dation drawer.

It has been held, that one of several part-owners of a ship, for whose accommodation a party had accepted a bill while in advance for them, could not claim (from the acceptor) as an onerous indorsee (*a*); or certain members of a committee, by whose authority bills had been granted for the price of subjects purchased under a statute, and who afterwards retired the bills individually (from a bank with which they had been discounted), and charged the payees on them (*b*); or an agent, who admitted on oath that he had got a bill as factor from his constituent, to discount and place the proceeds to his credit, which he had done, and afterwards retired the bill with his own funds, it being held no ground of onerosity that his employer was ultimately in his debt on the whole account (*c*). Further, when a stranger paid a note, while the granter was under diligence for it, and, having got an assignation to the diligence, charged an indorser, who alleged that he was trustee for the acceptor, a diligence was allowed to recover his books and those of the granter, in support of this averment (*d*). On the other hand, it was held not to disprove onerosity, that a bill indorsed by the drawer to his law-agent, and by him to a bank, on which diligence had been raised by the bank, was found in the agent's repositories after his death, with a re-indorsation by the bank; it being held presumable that the agent had retired it with his own funds, and that the re-indorsation was equivalent to a receipt (*e*). Nor was it admitted as a ground of suspending a charge by a company for payment of a bill, that one of the partners individually was said to have prevented delivery of goods for which the bill was granted (*f*). It has been also decided that a company, one of whom was a brother of the acceptor, retiring a bill to which they were no parties, after it became due, and part had been paid by the acceptor, without an indorsation by the bank who held it, were entitled, as onerous holders, to charge the drawer (*g*).

(*a*) *Bousie v. Harvey*, 18 Feb. 1832, 10 S. 355.

(*b*) *Campbell v. Lawrie*, 25 Nov. 1831, 10 S. 62.

(*c*) *Rust v. Brand*, 12 Dec. 1834, 13 S. 193.

(*d*) *Farquhar v. Sloan*, 2 Dec. 1830, 9 S. 112. Agency was afterwards held to be established by the whole circum-

stances of the case; 23 Jan. 1834, 12 S. 327.

(*e*) *M'Lachlan v. Henderson*, 16 June 1831, 9 S. 753.

(*f*) *Lang v. Allan*, 27 Jan. 1831, 9 S. 337.

(*g*) *Muir v. M'Donald*, 4 Mar. 1831, 9 S. 535.

As indorsation by way of donation has been sustained (a), it may probably be held that such an indorsee, though he cannot allege onerosity, should have the privileges of an indorsee, so as to be freed from the exceptions pleadable against his indorser. The presumption of value received is generally applied to indorsations only as a test of their *bona fides*, seeing that value is most frequently given for fair indorsations, and that indorsations without value are often made collusively for behoof of the indorser. But this reasoning fails in the case of donation, when the indorsement is irrevocable. On the other hand, if a bill has been acquired fraudulently, the holder will not be entitled to the privileges of an indorsee, though he should have paid its full amount. This doctrine seems to have been admitted (b) where the holder of a bill, on reference to his oath, deponed that he had given value for it. But, as onerosity only had been referred, the Court decided that the party so referring, having perilled the case on that ground, could not enter into the question of *bona fides*.

Indorsement
by way of
donation.

Allegations of fraud, or engagements inconsistent with onerosity, have been also repeatedly rejected, unless offered to be proved by the holder's writ or oath (c). It has been also held that inconsistencies between a party's statements on the record, and in his judicial examination when not on oath, do not disprove his onerosity and *bona fides* (d). As to the various circumstances stated on reference to oath or admitted, which confirm or disprove onerosity or *bona fides*, there can be no general rule; the cases cited below are noticed merely as illustrations (e).

Proof of want
of onerosity
and *bona fides*
only by writ or
oath.

(a) *H. M. Advocate v. M'Neill*, 6 Feb. 1864, 2 M'Ph.; and see *antea*, p. 20.

(b) *Megget v. Brown*, 14 Feb. 1827, 5 S. and D. 343.

(c) *Bell*, 13 May 1831, 9 S. 587; *Young v. Pollock*, 25 May 1832, 10 S. 570, where the Court, after the oath had been taken, held it incompetent to contrast it with previous statements in process; *Swanson v. Stewart*, 21 June 1838, 16 S. 1176; *Connal v. Stalker*, 23 Nov. 1849, 12 D. 169; *A. B. (Wedderburn v. Joel)*, 27 Nov. 1849, 12 D. 188.

(d) *Malcolm*, 30 June 1835, 13 S. 1021.

(e) *Hunter v. George's Trustees*, 24 May 1832, 10 S. 561; *affd.* 13 Apr. 1834, 7 W. and S. 333, referred to as containing a good statement of the general rule by Hope, L. J. C., in *Bannatyne v. Wilson*, 13 Dec. 1855, 18 D. 235;—*Wallace v. Scott*, 10 June 1848, 10 D. 1277; *Miller v. Kippen*, 9 Dec. 1848, 11 D. 233; *Boag v. Fisher*, 17 Jan. 1849, 11 D. 362; *Thomson v. Sharp*, 28 Feb. 1849, 11 D. 887; *Morrison v. Dick*, 27 Nov. 1834, 13 S. D. B. 95; *M'Fie v. Renwick*, 11 July 1835, 13 S. D. B. 1119.

SECTION IV.

INDORSATIONS AFTER THE TERM OF PAYMENT.

Indorsee, after term of payment, liable to exceptions against indorser.

It is a question, how far an indorsee is liable to the exceptions pleadable against his indorser, from the mere circumstance of the bill or note having been indorsed to him after the term of payment? Different rules 'were formerly' adopted on this subject in Scotland and in England. 'In Scotland it was formerly held, that that circumstance was not of itself sufficient to affect the rights of the indorsee, and that it was but one of many other circumstances which, if combined, might throw suspicion on the indorsement (a). As it appeared to the Legislature that this state of the law unduly extended the privileges of bills, by making them negotiable long after the period fixed by the parties themselves for payment, the Mercantile Amendment Act assimilated our law to that of England. Under the English law the negotiability is not altogether arrested at the term of payment; but it is held, that after that, the bill comes disgraced to its holder, and that he therefore acquires no better right to it than his indorser. In short, in place of acquiring the rights of an indorsee, he acquires rights more resembling those of an assignee (b). The words by which the Mercantile Amendment Act amends the law of Scotland are brief and explicit: "When any bill of exchange or promissory-note shall," it is enacted, "be indorsed after the period when such bill of exchange or promissory-note became payable, the indorsee of such bill or note shall be deemed to have taken the same, subject to all objections or exceptions to which the said bill or note was subject in the hands of the indorser" (c). It is believed that no cases have occurred requiring the Court to construe the provisions of this enactment; but, in the way of illustrations of the mode in which it may be expected to work, the decisions of the English Courts, which have long applied the principle it embodies, may be valuable.'

(a) *Wilkie v. Wilson*, 30 Nov. 1811, F. C.; *M'Gowan v. M'Kellar*, 24 Feb. 1826, 4 S. 498. A full examination of the old Scottish decisions on this point is contained in the former edition of this work, pp. 303-308, to

which those interested in the history of the matter are referred.

(b) According to the maxim, *Assignatus utitur jure auctoris*.

(c) 19 & 20 Vict. c. 60, § 16.

In England it has been held, that the circumstance of a bill or note being unpaid after the term of payment affixes to it such suspicion as should prevent any person from taking it without inquiry. It seems to be established, that, in general, the mere circumstance of a person taking a bill or note after the term of payment, subjects him to the exceptions pleadable against his indorser (*a*). Thus, a receipt by the indorser, granted before the indorsement, in full of all demands, was, on the ground now stated, found effectual to the acceptor against the indorsee (*b*); and an indorsee who had taken a bill after the term of payment was found not entitled to sue the acceptor, in respect that the indorser had got it from the defendant, with reference to a hypothetical balance on accounts between them not yet settled, so that the defendant was not yet constituted *his* debtor for the sum in the bill (*c*).

Illustrations of this rule from the law of England.

There are some limitations of the rule now stated, though none of them are inconsistent with its principles. 1. It has been held (*d*), that the indorsee's claim is liable to exceptions on the bill transaction, but not to those arising from collateral matters. 'Thus the indorsee cannot be met with a claim of set-off which the acceptor had against the indorser, even though the indorsee knew of it, and took the bill for the purpose of defeating it (*e*).' 2. In an action by the holder against the drawer of a dishonoured banker's check, which

Limitations of the rule, from the law of England.

(*a*) This was the opinion expressed in *Brown v. Davis*, 1789, 3 T. R. 82, *per* Buller and Ashurst, J., overruling Lord Kenyon, C. J. The same doctrine was afterwards held by Lord Kenyon at Nisi Prius, in *Good v. Cuis*, cited 7 T. R. 427, as the ground for deciding a number of cases where there was no proof, but the strongest presumption of fraud; and also by the Court of King's Bench, in *Boehm v. Surling*, 7 T. R. 430, though it was found inapplicable to the particular case; as likewise in *Brown v. Turner*, 1798, 7 T. R. 630, where the rule was applied.

(*b*) *Thoroughgood v. Clark*, 2 Stark 251.

(*c*) *Verley v. Sanders*, 2 Chitty, R. 127.

(*d*) *Burrough v. Moss*, 10 B. and

Cr. 558. There are a number of specialties in this case, which cannot be made use of in a treatise on Scotch law.

(*e*) *Whitehead v. Walker*, 1842, 10 M. and W. 697; *Oulds v. Harrison*, 1854, 10 Exch. 572. In these cases Coleridge's opinion in *Goodall v. Ray*, 1835, 4 Dowl. P. C. 76, was treated as obiter on this point, and as having probably been misreported. In Scotland, if the claim of compensation was liquid, that could be pleaded (because pleadable against the indorser); and in England, a leaning to a similar view has been shown, for if the indorser have contracted to allow the claim to be set off against the bill, it is then pleadable against the indorsee. See cases cited above, and *Cripps v. Davis*, 1843, 12 M. and W. 159.

the drawer *had himself* issued to the payee for value, nine months after its date, he was found to be thereby personally excluded from pleading against a subsequent holder an exception which he had against the payee (*a*). The same principle seems applicable to the case of a bill or note. 3. It has been decided, with regard to a bill accepted by the drawee for the drawer's accommodation, which the former allowed to remain in the latter's hands after the term of payment, that a person taking it after that term from the drawer has a good claim on it against the acceptor. It seems to have been held, that the only purpose of giving such a bill to the drawer was, that it might be negotiated, and that this purpose might be served after as well as before the term of payment, if the acceptor still left it in the drawer's hands 'without any condition that he was not to indorse it' (*b*). 'Whatever may be thought of this doctrine (*c*), it is clear that the indorsee can recover if he got such a bill from an indorser who had given value for it (*d*).' 4. It has been held that an indorsee, even after the term of payment, being in his indorser's full right, is not liable to objections not pleadable against him; so that, if the indorser took the bill or note before the term of payment, an objection that it was granted for a smuggling transaction, not being pleadable against him, cannot be stated against the indorsee (*e*). 5. When the indorser of a bill or note pays it to the holder after it falls due, he will thereby be entitled to recover its amount from any of the preceding parties, though the holder has previously recovered payment in part, or even wholly, under securities which another party lodged with him (*f*). The indorser, if he had no notice of such a payment, was entitled to suppose, from the bill being undischarged in the holder's possession, that it was unpaid, and having therefore paid it, is entitled to indemnity from the previous parties. 6. When a banker has received a bill before it is payable, in security of a balance due to him, and it is afterwards returned to

(*a*) *Boehm v. Stirling*, 7 T. R. 430.

(*b*) *Charles v. Marsden*, 1808, 1 Taunt. 224; *Stein v. Yglesias*, 1834; 1 C. M. and R. 565; *Sturterant v. Ford*, 22 April 1842, 11 L. J. (C. P.) 425; *Carruthers v. West*, 18 Nov. 1847, 17 L. J. (Q. B.) 4.

(*c*) Compare *Tinson v. Francis*, 1807, 1 Camp. 19.

(*d*) *Per* Ellenborough in *Bosanquet v. Dudman*, 1 Stark. R. 1; and see *Watkins v. Maule*, 1820, 2 Jac. and Walk. 244.

(*e*) *Per* Lord Ellenborough in *Chalmers v. Lanion*, 1808, 1 Camp. 383.

(*f*) *Buzzard v. Flecknoe*, 1816, 1 Stark. 333, *per* Lord Ellenborough.

his debtor, who, however, after payment is refused to him, gives it back to the banker on the same account, without receiving new credit for it, it has been found that the banker resumes his former rights in it, so as not to be affected by intervening exceptions against the right of the party depositing it (*a*). As the banker's right depended in this case on the original indorsement by his debtor, which appears to have remained, it must have drawn back to the date of the indorsement, as soon as the bill came again into his hands. 7. It has been found that an indorsee, after the term of payment, though his right may be affected by entries proved to have been made by his indorser, in his own books for instance, at the same time and as part of the same act with his indorsement, will not be affected by other entries, not proved to have been so made, but which may have been made afterwards (*b*).

A bill or note, payable on demand, is not held, merely from its terms, to be overdue, unless payment has been demanded and refused (*c*). Nor is such demand pleadable against the holder of the bill or note, unless it appears *ex facie*, 'or he have otherwise knowledge' of it (*d*). It has been further decided (*e*), that a note payable on demand, *with interest till paid*, is not overdue, though 2½ years' interest appears to have been paid on it, because the stipulation of interest implied that it was not to be paid immediately (*f*). When a bill was indorsed a second time by the original indorser, after intermediate indorsations, it has been held that the second indorsement must have been made after it was returned dishonoured (*g*). In the case of a bill indorsed for value after the term of payment, by a person who had got it to recover payment for a previous indorser, this indorser's right was held effectual against the last holder, insomuch that a new bill drawn in payment of the first by the drawers of that bill, when payment was demanded from them, was found, in a question between an agent

When indorsation is held to be after term of payment.

(*a*) *Per* Lord Ellenborough in *Bonquet v. Dudman*, 1814, 1 Stark. 1, Part 2.

(*b*) *Collenridge v. Farquharson*, 1 Stark. 259, *per* Lord Ellenborough.

(*c*) *Barongh v. White*, 4 B. and C. 324, 6 D. and R. 379.

(*d*) *Brooks v. Mitchell*, 1841, 11 L. J. (Ex.) 51.

(*e*) *Gascoyne v. Smith*, 1825, 1 M'L. and Yo. 348, *per* Garrow, B. *Vide* also *Heywood v. Watson*, 4 Bing. 496, and opinion of the Court in *British Linen Co. v. Mackay*, 22 Jan. 1836, F. C.

(*f*) As to when a check is overdue, see *antea*, pp. 118, 119.

(*g*) *Fryer v. Brown*, 1 R. and M. 146.

of the last indorsee and the acceptors, to be payable, after notice given them by the previous indorser of the first bill, to him alone. The last bill was thus held to be the produce of the first (a).

SECTION V.

BILLS OR NOTES LOST, STOLEN, OR DESTROYED.

1. *Rights and Duties of Holder.*

Holder of a bill, lost, stolen, or fraudulently obtained, must prove that he gave value.

“Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given by him for the same; but such proof may be by parole evidence” (b).

‘Prior to this provision of the Mercantile Amendment Act, proof that a bill had been lost, or stolen, or fraudulently obtained, did not, unless it affected the holder with complicity in the fraud, place him in any different position from that of the holder of any other bill. The law presumed him to be a *bona fide* and onerous holder, and permitted want of *bona fides* and consideration to be proved only in the usual manner, namely, by his writ or oath (c). Under the new law, his *bona fides*, that is to say, his absence of knowledge of fraud, would still be presumed, and, unless where it was shown that he was a party to the fraud, could still be rebutted only by writ or oath. No change has been made on the old law in this respect. But on the acceptor or other party sued proving that the bill has been lost, stolen, or fraudulently obtained, the holder is to prove that he gave value for it. The effect of this provision is to make the law of Scotland substantially the same as that of England.’

Law of England.

In England, a holder may, under such circumstances, recover from any of the previous parties, and they may safely pay to him,

(a) *Lee and Another v. Zagury*, 8 Taunt. 114. shall, 21 June 1799, M. Bill, Ap. 11; *Swinton v. Beveridge*, 21 June 1799.

(b) 19 & 20 Vict. c. 60, § 15.

(c) *Crawford v. Royal Bank*, 24 Feb. 1749, M. 875; *Lambton v. Mar-*

shall, 21 June 1799, M. Bill, Ap. 11; *Swinton v. Beveridge*, 21 June 1799, M. 10105; *Scott v. Kilmarnock Banking Co.*, 27 Feb. 1812, F. C.

though he should not prove to them that he gave any consideration for the bill or note (*a*). But when it is shown that a bill or note has been lost or stolen, even the holder (on reasonable notice given him beforehand, to instruct the circumstances under which he received it) will be bound to prove, both that he got it *bona fide*, and that he gave a valuable consideration for it (*b*). ‘This principle, which was that first adopted by the English Courts, has again been returned to, after a very remarkable fluctuation of decisions. Although it was much less favourable to the holder than the rule adopted by the Scottish Courts, it was at one time considered to afford too great facilities for the circulation of improperly obtained bills. Accordingly, in addition to the questions of good faith and onerosity, Lord Tenterden further put it to the jury to say whether the holder had exercised due caution in taking it, or “had taken it under circumstances which ought to have excited the suspicion of a prudent and careful man?” And if the jury found that he had been negligent in this respect, he did not recover (*c*). This rule was, on the other hand, found to be too severe on innocent holders, and was modified so as to allow them to recover, unless it was proved that they had not acted with gross negligence (*d*). Even this was found too stringent, and the old rule was then re-adopted (*e*).

‘Of the operation of this rule, an illustration from a leading English case may be given (*f*). Some Bank of England notes of large value were stolen. In the usual manner, notice of the particulars was sent; and among others who received notice was the plaintiff, a money dealer in Paris. After the lapse of a year, one of

*Raphael v.
Bank of Eng-
land.*

(*a*) *Per Holt*, C. J., 3 Stalk. 71.

(*b*) *Miller v. Race*, 1758, 1 Burr. 452; *Peacock v. Rhodes*, 1781, 2 Doug. 633; *Solomons v. Bank of England*, 1791, 13 East. 135; *Collins v. Martin*, 1797, 1 B. and P. 648; *Lawson v. Weston*, 1801, 4 Esp. 56.

(*c*) *Gill v. Cubit*, 1824, 3 B. and C. 466; *Snow v. Peacock*, 1826, 3 Bing. 406; *Stange v. Wigney*, 6 Bing. R. 677; *Slater v. West*, 3 Car. and P. 325.

(*d*) *Crook v. Jadis*, 1834, 5 B. and Ad. 909; *Backhouse v. Harrison*, 1834, 5 B. and Ad. 1098.

(*e*) *Goodman v. Harvey*, 1836, 4 Ad. and E. 870; *Bank of Bengal v. M'Leod*, 7 Moore, P. C. 35; *Hayes v. Caulfield*, 1843, 5 Q. B. 81. *Per Williams, J.*, in *Ingham v. Primrose*, 28 June 1859, 29 L. J. (C. P.) 294. The statement in Chitty, p. 179, note 6, that the law as laid down by Tenterden, in *Gill v. Cubit*, *supra*, is still followed in America, seems to be a mistake. See Story on Bills, §§ 194 and 416.

(*f*) *Raphael v. Bank of England*, 1855, 25 L. J. (C. P.) 33.

the notes (for L.500) was presented to him by a stranger, and after an examination of the passport, was discounted on the usual terms. The money dealer did not look at the list of stolen notes sent to him. The jury returned a special verdict, finding that the money dealer had given value for the note, and did not know at the time, although he had the means of knowing in his possession, that the note was stolen. It was held that the money dealer was entitled to recover from the bank. Lord Tenterden's doctrine as to negligence was treated as exploded; and it was explained that taking a bill in *bona fide* meant only taking the bill really and truly for value, and without knowledge of the robbery, or other fraud, as the case might be.'

2. *Rights and Duties of Loser.*

Duty of loser
in regard to
protesting, etc.

Although a bill or note should be lost or destroyed, even while in the drawee's hands, the creditor must protest it for non-acceptance and non-payment, as if it were extant, and must give due notice of its dishonour to all the previous parties, otherwise he will lose his recourse against them (*a*). The protest, in such a case, may be made on a copy of the bill or note. In taking a protest for non-payment, though the bill be lost, in order to preserve recourse, it is proper to accompany the protest, as suggested by Marius (*b*), with an offer of security against its reappearance. But, notwithstanding the opinion expressed by that author, viz., that, if the acceptor refuses payment on such an offer, he will be liable in all damages, it is clear that none of the parties could be obliged to pay, until the loss was proved in an action, and security found against its reappearance (*c*).

Action of
proving the
tenor.

When a bill or note has been lost or destroyed, its contents may, notwithstanding, be established in Scotland by a process for proving the tenor. In this process, the pursuer must, in the first place,

(*a*) This was held by Lord Ellenborough in *Thackray v. Blackett*, 3 Camp. 164, where the drawee of certain bills having destroyed them by mistake, the holder, who, though he presented them for payment, did not notify their non-payment to the drawer, was found

to be thereby precluded from his recourse against the drawer. Story, § 279.

(*b*) 80.

(*c*) *Ewing v. Hibbert*, 4 July 1823, 2 S. 455; *Hansard v. Robinson*, 7 B. and C. 90.

establish the fact and particular mode of its loss or destruction, or the *casus amissionis*, and he will then be allowed to prove the tenor of the writing in the manner required in such processes with regard to all written instruments that are lost or destroyed. In one case (a), the pursuer, in a proving of the tenor of a bill, was required to condescend specially on the cause of its disappearance, before he could be allowed a proof, though there was no evidence of its being retired. In another case (b), the First Division of the Court dismissed a process for proving the tenor of a lost bill, which had been brought against the acceptor's representatives, in respect that no *casus amissionis* was stated, holding that, as to a bill or note, there was a presumption of payment, from the mere circumstance of its being no longer in the creditor's possession, without the necessity of a discharge, as in the case of a bond, and that this presumption was not obviated merely by proving that the bill had once existed. The converse of this doctrine was laid down in an earlier case (c), in which it was held that *casus amissionis* did not require to be proved where the writ was not extinguished simply by retiring it. In another case (d), a process for proving the tenor of a lost bill was dismissed, on the ground that the *casus amissionis* libelled, viz., that the bill had been borrowed with other papers by the debtor's agent, and had never since appeared, was not sufficient to warrant a proving of the tenor, which was held to be matter of great delicacy with regard to a bill, and never to be admitted except on strong grounds. But the Court reserved the pursuer's recourse against the debtor's agent.

A proving of the tenor may be pursued, not only by the creditor in the bill or note, but by any party who has a direct interest in it; for instance, by the acceptor, if he has paid it, and wishes to establish the payment as an article of credit with the drawer, or if the pursuer is drawer, and has given the drawee credit for the bill or note in their mutual account, on the supposition that the drawee was to pay it (e).

(a) *Campbell v. York Buildings Company's Crs.*, 22 Feb. 1780, Morr. 15828.

(b) *Carson v. Macmicken*, 14 May 1811, F. C.

(c) *A. v. B.*, 21 Nov. 1749, M. 15283.

(d) *Macfarlane v. M'Nee*, 28 Feb. 1826, 4 S. 509.

(e) *Forbes on Bills*, 28-9, and case of *Drummond v. Jackson*, 27 Nov. 1701, which is there cited.

Loser's right to demand a new bill, or sue on lost bill.

1. Where lost bill not negotiable.

But, although the loss or destruction of a bill or note, and also its contents, be thus proved, the creditor will not be, in all cases, entitled unconditionally, either to have a new instrument from the drawer in place of the former one, if it has been lost or destroyed before the term of payment, or to enforce payment of it when due. If, indeed, the first instrument has been destroyed, so that no claim can arise on it, or has been specially indorsed by the payee to the person who lost it, so that no other person can claim on it, or, being made payable to a specified person, has never been indorsed, the drawer cannot then allege against granting a new bill or note, that he runs the risk of a claim from any third party on the former one, nor can any of the parties liable under it assign this reason for refusing payment (*a*). Probably, however, it would be necessary in Scotland, that the creditor claiming payment of a lost bill or note not indorsed, or specially indorsed to him, or requiring the drawer to grant a new bill or note instead of it, should previously find surety that he will not indorse the first instrument to a third party, if found. 'In England, where an action is founded on a bill alleged to have been lost, the Court has power to order indemnity to be given to its satisfaction against the claims of any other person (*b*).'

2. Where the lost bill was negotiable.

If the lost bill or note is blank indorsed, or payable to the bearer, so as to be transferable by delivery, the creditor cannot maintain action for it, without finding surety to the defendant against his being made liable for payment to some other holder. Forbes lays it down, that in such a case the drawer may be compelled to give new bills, the same with the former,—*i.e.*, if number 1 has been lost, that he may be compelled to give another number 2, to be paid if number 1 is not paid; and he seems to think that warrandice will not be required except after the term of payment (*c*). Warrandice would undoubtedly be necessary in that case; because,

(*a*) In *Hart v. King*, 12 Mod. 310, Holt, C. J., sustained a claim against the drawer of a bill which was lost, on the latter admitting that he had signed it. It is not said that the bill had been indorsed. In *Long v. Baillie*, 2 Camp. 214, note, which was an action for the amount of a bill made payable to the drawer, and by him specially indorsed to the plaintiff, against the acceptor,

the jury found for the plaintiff, on the loss of the principal bill, and the correctness of a copy which was produced being established. As to the case of a bill or note destroyed, *vide* Lord Ellenborough's opinion in *Pierson v. Hutchinson*, 2 Camp. 221; also Chitty, 183.

(*b*) 17 & 18 Vict. c. 125, § 87.

(*c*) Forbes, 28.

at the time when the second bill is granted, a finder of the first bill may have exacted payment from some of the other parties to it. It seems to be also necessary, though the second should be granted before the first falls due; because, though the payment of it be made conditional on non-payment of the first, yet, as the first is payable absolutely, any holder may exact payment under it long after the term of payment, and after the second bill has been paid, on the supposition that it would not be found. 'Under the English common law, as it existed prior to the statute 17 & 18 Vict. c. 125, referred to in the last section, where a negotiable instrument was lost, the loser had no remedy either in an action on the bill (*a*), or in an action for the consideration given for it (*b*), though he had a remedy in equity on finding security (*c*).

'Where a bill has been lost, the holder has still his action for the value he gave for it. In this action he must prove the loss of the bill, and give security, to the satisfaction of the Court, against other demands on it. If he do this, and show good equitable grounds for his demand, he will succeed.' In a case (*d*), where the holders of certain notes issued by two several banks cut each note into halves, one of which only contained subscriptions, and sent each half to its destination in a separate parcel from the other, the Court of Session decided, on the halves which contained the signatures being lost or stolen, that the holders had no claim against the banks on the remaining halves for the amount of the notes, even on security against the reappearance of the lost halves. The Court are said to have proceeded on the ground that the holders had precluded themselves from the equitable remedy which they claimed, by cutting the notes. But the judgment was reversed on appeal (*e*); and the case was remitted, with instructions to allow a proof of the pursuer's averments in support of his claim,—*e.g.*, as to the fact of the halves preserved forming part of notes issued by the bank, the mode in which the other halves were lost, and other facts stated by him,—as well as of the defender's counter averments. The de-

Right to sue for the consideration given for the lost bill.

(*a*) *Hansard v. Robinson*, 7 B. and C. 95.

(*b*) *Clay v. Crowe*, 8 Exch. 295; *Dangerfield v. Wilby*, 4 Esp. 159.

(*c*) *Walmsley v. Child*, 1 Ves. sen. 338; *Toulmin v. Price*, 5 Ves. 238.

(*d*) *Maberly and Co. v. The Bank of Scotland and Commercial Bank*, 27 Feb. 1822, 1 Shaw, 360-1.

(*e*) 1 Mar. 1825, 1 W. and S. 10.

fenders, however, having declined to meet the pursuer in this proof, decree was pronounced in his favour (a). The House of Lords held, that the equitable remedies competent in the case of bills or notes which are entirely lost were equally competent in this case, where only part of them was lost; and that such remedies were not excluded by the circumstance of the pursuer having cut the notes, if he did so only to diminish the risk of loss (b). There was not here a proving of the tenor, as the action was brought not on the instruments themselves, but generally for the debt; and their identity was averred merely in support of that action (c).

Remedy
against Post-
office, or other
carrier losing.

It has been decided, both in Scotland and England, that the Postmaster-General is not liable for bills or notes stolen from letters put into the Post-office, although the theft has been committed by a letter-carrier (d). But a deputy-postmaster is responsible for not delivering letters in due time, according to their address, within the post-town where he resides (e), unless where the plaintiff might, by due diligence, have prevented the damage thence arising (f). It has been held, that if a party is desired by his correspondent to remit him money in a bank-bill by post (g), or even if no instructions be given, yet, as that is the usual mode (h), he will not be liable to his employer, though the bill should be stolen, and the proceeds drawn by a third party. But he will be liable for the loss if he has not taken care that the letter is put safely into the Post-

(a) 11 Mar. 1826, 4 S. 550.

(b) In *Wright v. Smith*, 2 B. and A. 501, the practice of cutting notes into two, and sending the several halves by separate conveyances, was recognised by the Court of K. B., per Abbot, C. J., as a reasonable precaution. The case turned on another point, which is noticed afterwards in the chap. on Negotiation.

(c) The objection, that there ought to have been a proving of the tenor, was disregarded both in the Court of Session and in the House of Lords.

(d) *Lane v. Cotton*, 1 Lord Raym. 646, confirmed by *Whitfield v. Lord de Spenser*, 2 Cowp. 754. The same point was decided in Scotland, after an argument which referred to these two

decisions, in *Farries v. Elder*, 21 June 1799, M. 10103.

(e) This was decided in *Rowning v. Goodchild*, 3 Wils. 443, where a deputy-postmaster had detained a letter addressed to the plaintiff, on account of his refusing to pay an extra charge of one halfpenny besides the regular postage, which extra charge was found to be illegal.

(f) *Horden v. Dalton*, 1 C. and Pay. 181.

(g) *Cuming v. Marshall*, 21 Dec. 1752, Morr. 10095. Vide also this case as to the proof admitted of the letter containing the notes having been put into the Post-office.

(h) *Warwick v. Noakes*, Peake, 67.

office ; for instance, if he has delivered it to a bellman on the streets of London (*a*). ‘Under the Carriers Act (*b*), when bills or notes are sent by a carrier, of an aggregate value exceeding L.10, the sender must declare the value, and pay such increased charge as the carrier’s published table of rates may authorize.’

(*a*) In *Hawkins v. Rutt*, Peake, 186, him to remit some money in bills by
per Lord Kenyon, such a delivery was post.
held not to exoner the defendant, (*b*) 1 Will. IV. c. 68, §§ 1, 4.
where his correspondent had desired

CHAPTER IV.

OF ACCEPTANCE.

TRANSFERENCE, by indorsement or otherwise, has been discussed before acceptance, because the former is common to bills and notes, whereas the latter is peculiar to bills. It has been said, that a promissory-note may be considered as a bill accepted at the time of issuing (*a*). But, according to its plain import, it is a direct obligation by the granter to pay a certain sum to a third party. A bill, on the other hand, is a request to a third party, called the drawee, to pay a certain sum, either to the drawer or to some creditor of his. The act by which the drawee binds himself to pay, in terms of this request, is his acceptance.

Bills payable on demand require no acceptance, because they are due when presented. Whether acceptance is necessary in bills payable at sight, depends on the question whether they are payable on demand, or whether three days of grace must be allowed on them. This point shall be afterwards discussed in considering the payment of bills.

There is another kind of acceptance, called acceptance *supra* protest, which shall be separately considered (*b*).

SECTION I.

WHO MAY ACCEPT ?

Who may
accept?

The rules which have been laid down, as to the parties generally to bills or notes, apply also to acceptors. If the holder of a bill finds the drawee incapable of contracting,—for instance, a minor, a mar-

(*a*) 2 Blackst. 470 ; Bayley, 170.

(*b*) *Vide* Chapter on Negotiation.

ried woman, or an idiot,—he may consider the bill as dishonoured (*a*), and protest it for recourse against the drawer. The drawing of a bill implies a guarantee by the drawer, that the drawee is capable of binding himself; and, if he is not, the drawer will be liable for his non-acceptance from incapacity, as well as from any other cause.

It has been already shown that a person may become bound, as acceptor of a bill, by the act of his agent (*b*); but a clear and express authority from the principal must be produced, otherwise the holder will not be bound to take such an acceptance as effectual (*c*). It has been said (*d*), that if the holder takes an acceptance by procuration, without notice to the other parties, they will be released if the procuration turns out bad. But it will immediately appear, that no notice could prevent such a result, unless the acceptance were rejected and the bill protested for non-acceptance. The holder, therefore, admits the procuration at his own risk. It has been doubted, whether the holder of a bill is bound to take an acceptance, in any case, by an agent (*e*), as it multiplies the proof which he must bring in an action on the bill. This doctrine is inapplicable in Scotland, where no proof of subscription is necessary even to authorize summary diligence on a bill or note, and where summary diligence would be issued against the principal, on a document signed for him by procuration (*f*), leaving him to dispute the procuration, like the genuineness of his signature, in a suspension. But although the holder were obliged to prove the procuration, that does not appear to be a reason for refusing to take such an acceptance, as this is a recognised mode of subscribing bills, which all parties must have had in view. Beawes observes, that the holder must take such an acceptance when the procuration is clear (*g*). The two cases cited to the contrary (*h*) do not relate to bills, but to transactions not generally managed by procuration, and in which, therefore, the party was found not liable to accept the procurator's acts as those of his principal.

Whether holder bound to take acceptance by agent of drawee.

'If there be no address on a bill, any person may accept it, the

Acceptance by one who is not drawee.

(*a*) Chitty, 194. (*b*) *Antea*, 147.

(*c*) Beawes, No. 87.

(*d*) 1 Bell, 399. (*e*) Chitty, 194.

(*f*) *Vide* Chap. on Action and Diligence.

(*g*) No. 87.

(*h*) *Coore v. Callaway*, 1795, 1 Esp. 116; and *Richards v. Barton*, id. 268, cited by Chitty, 194. The former case related to a conveyance of real property; the latter to the purchase of an annuity to be secured on certain premises.

defect in the address being supplied by the acceptance (a). But if the bill bear an address to any one, that person alone can accept. Thus, if a bill, addressed to a person named Hart, be accepted by another named Clarke, the latter cannot be sued as acceptor (b). And if a bill be addressed to one and accepted by two, the acceptance by the latter is null; and the bill is, moreover, vitiated as to the former by having been altered in an essential part (c). It seems, however, that a second person may accept a bill addressed to a first, if he accept on the footing, expressed (d) or understood (e) at the time the bill was issued, that he was to be cautioner for the first; and if a person in this way become validly a party to a bill, he stands towards the holder in the same relation as if he were a co-principal, his rights as cautioner merely regulating his right of relief against the true principal (f).'

Bill addressed
to two or more,
accepted by
one.

In the opposite case, where a bill is addressed to two persons (not in partnership), and only one of them accepts, the holder is not bound to take the acceptance, as it is not conformable with the bill (g); unless the bill is addressed to two persons, "or either of them," in which case the acceptance of either is a sufficient compliance with the drawer's mandate (h). The objection to bills or notes which are uncertain as to amount, or the names of the payee or debtor, or the ultimate enforcement of the obligation, viz., their inconsistency with the nature of a bill or note (i), does not seem to be applicable in this case, since one obligant at least, viz., the drawer, is bound at all events, whether the one drawee or the other accepts. When a

(a) *Gray v. Milne*, 1819, 3 Moore, 90.

(b) *Davis v. Clarke*, 24 May 1844, 13 L. J. (Q. B.) 305.

(c) *Antea*, 112, under Alterations on Acceptors.

(d) *Macdougall v. Foyer*, 13 Feb. 1810, F. C.

(e) *Clerk v. Blackstock*, 1816, Holt, N. P. 474. A promissory-note was made in the usual terms by Jackson, and below his signature Blackstock subscribed. In an action against Blackstock, it appeared that his name had been added as surety. *Bayley, J.*, ruled that an additional stamp was not

necessary, if it was part of the original bargain that Blackstock should subscribe; and, on its appearing to have been so, the plaintiff had a verdict.

(f) *Sharp v. Harvey*, 24 June 1808, M. voce Bill, Apx. No. 22; *Gibson v. Campbell*, 27 Nov. 1753, M. 1406. Compare with the cases cited in this paragraph, those cited before (p. 174), in the paragraph on Indorsation by a person who is not the payee.

(g) *Vide* Molloy, 2, 10, 18; Marius, 64-5.

(h) *Scarlett*, C. 10, R. 39; *Beawes*, No. 228; Marius, 65.

(i) *Antea*, p. 11.

bill is drawn on several partners, the acceptance of one partner, either under the company's firm, or for himself and the other partners, is sufficient (a). His individual acceptance is insufficient (b).

SECTION II.

TIME OF ACCEPTANCE.

By the custom of merchants, the drawee is allowed twenty-four hours, or till the day after the bill is presented to him, to consider the state of accounts betwixt him and the drawer, and determine whether he will accept or not (c), unless the post goes out in the meantime, when it is said that the bill, if not accepted immediately, should be protested, so that its dishonour may be notified by the first post (d). If acceptance is refused within the twenty-four hours, a protest and the other necessary measures ought to be taken immediately (e). If the drawee, after keeping the bill for twenty-four hours, requires more time, it has been pointed out as the safest course, to give the other parties notice of the non-acceptance (protesting previously for non-acceptance) (f), that they may be put on their guard (g). It is said, that, if the drawee accepts after all, the holder may demand that his acceptance should be of the date when the bill was first presented (h).

Time allowed
to drawee to
accept.

'A bill may be accepted before it is drawn. By signing his name on a blank bill stamp, the signer gives to the holder power to fill up the document either as an acceptance or as a promissory-note for any sum which the stamp will cover, and at any term of payment which he pleases to select; and the signer is not entitled to

Acceptance
before the bill
is drawn.

(a) *Antea*, p. 164.

(b) *Ibid.*

(g) *Per* Lord Ellenborough in *Ingram v. Forster*, 2 Smith's Rep. 245. Chambre, J., had previously overruled the objection of want of notice at the trial. A new trial was allowed on another ground; but Lord Ellenborough also suggested the want of notice as a proper subject of inquiry at a new trial.

(c) *Marius*, 62; *Malynes*, 3, 6, 1. *Per* Treby, C. J., in *Bellasis v. Hester*, 1 Lord Raym. 281, who says that the drawer ought to be allowed the whole day by law to view the bill. The *Code de Commerce* allows only twenty-four hours. *Nonguier*, § 352.

(d) *Beawes*, No. 17. (e) *Ibid.*

(f) *V.* opinion given to this effect by *Forbes*, 70.

(h) *Scarlett*, C. 10, R. 18.

notice either of the time or the terms on which the bill may be filled up (a).'

Acceptance
after term of
payment.

Acceptance may be made even after the term of payment fixed in the bill (b), and after a prior refusal to accept (c), the chief object of the bill being payment of the money, without exclusive reference to the term of payment (d). Acceptance after the term of payment will bind the acceptor to pay the bill on demand. But he alone will be liable, not the drawer or prior indorsers, unless the bill has been protested for non-acceptance and non-payment, and notice of both duly given to them (e).

Acceptance
after drawer's
bankruptcy.

It has been doubted (f), whether a drawee, though he has effects of the drawer in his hands, should accept after he hears of his bankruptcy, as one of the creditors ought not to be paid before another. This question is not perhaps of much importance in Scotland, since the draft, whether accepted or not, operates an assignment to the payee of the drawer's funds in the drawee's hands, when intimated to him, and, if there is no intervening diligence, will be effectual from that date, although the drawer become bankrupt before intimation, unless it is an illegal preference, under the Act 1696, or otherwise. Even in that case, the transference will be effectual, unless the other creditors challenge it. It is only when the drawer's estate has been sequestrated, or otherwise at-

(a) *Lyon v. Butler*, 7 Dec. 1841, 4 D. 178; *Grassick v. Farquharson*, 8 July 1846, 8 D. 1073; and cases cited, *ante* (b) and (c), p. 38; (g), (h), and (i), p. 41; and (b), p. 49.

(b) *Wynne v. Raikes*, 5 East. 513. In *Jackson v. Pigot*, 1 Raym. 364, and 12 Mod. 212, action was sustained on an acceptance which had been adhibited after the term of payment. In *Mitford v. Walcot*, 1 Raym. 564, an acceptance was held effectual, which had been made after the term of payment, but within the days of grace.

(c) In *Wynne v. Raikes*, note (b), the drawees, after refusing to accept, wrote a letter, which was sustained as equivalent to acceptance.

(d) *Beawes*, No. 224.

(e) In *Mitford v. Walcot*, 1 Raym.

574, it is admitted that such acceptance could scarcely found a good action against the drawer. But the doctrine stated in the text is implied in the rules of protest and notice to be afterwards explained. In *Brown v. Hume*, 14 Nov. 1705, M. 1547, where the holder of an inland bill, after protesting it on the drawee's refusal to accept, had taken his acceptance, he was found entitled to recourse against the drawer, without notice. But this case would not now be followed.

(f) Chitty, referring to Pothier, No. 96, who refers to *Sacchia de Cambio*, § 2, gl. 5, No. 391. It is laid down by Forbes, 75, "that the bill cannot be accepted after the drawer's bankruptcy."

tached before intimation of the draft, that his funds in the drawee's hands cannot be transferred. In that case, the drawee must not accept, and, though he did, his acceptance could not transfer the funds in prejudice of the sequestration. But further, though there is no sequestration, the drawee would not be justified in accepting after he knew of the bankruptcy, because his acceptance would tend to defeat the right of the other creditors to challenge the draft, whereas he is bound to do nothing that can alter the situation of either party. If he does, he may be held accessory to the illegal preference, should it be afterwards challenged. But if he accepts the draft without knowing of the bankruptcy, he cannot be subjected in payment to the creditor, if the draft is set aside, as his acceptance binds him only in terms of it. This point is doubted by a learned author (*a*); but it seems to be supported, though not finally settled, by a decision which he cites. If the drawee has accepted a draft made within sixty days of the drawer's bankruptcy, while himself a creditor of the drawer, he cannot, as creditor, retract his acceptance and challenge the draft; the acceptance implying a renunciation of his challenge (*b*). The drawee is entitled to accept and pay, though the drawer should die before the bill is presented, such an order being irrevocable when in the hands of a third party. It is an absolute assignment to the payee of the drawer's funds in the drawee's hands, and takes effect so soon as intimated (*c*).

It has been said (*d*), that a drawee may get quit of his acceptance, as fraudulently obtained, if the holder is aware of the drawer's actual or approaching bankruptcy when he presents the bill, and does not inform the drawee, or sends the bill for ac-

Whether such acceptance binds the drawee.

(*a*) Forbes, 84. The decision is *Durward v. Wilson*, 2 Feb. 1700.

(*b*) A contrary opinion is expressed by Pothier, No. 120; but, for the reasons mentioned in the text, it does not appear to be well founded.

(*c*) On this subject, Chitty, 314, refers to *Tate v. Hilbort*, 2 Ves. 115-16, where the payment by a banker of a draft on him, before he knew of the banker's death, was held to be good; and *Hammonds v. Barclay*, 2 East. 227, where a factor accepting bills, under the same circumstances, for his

constituent, was found entitled to credit for them. But there was a separate ground of decision in these cases, viz., that the mandate must be held to subsist, *quoad* the mandatary, so long as he is ignorant of the mandant's death. In the case stated in the text, the order in the payee's hands is irrevocable, so that he might insist on acceptance by the drawee, even though the latter was aware of the drawer's death.

(*d*) Pothier, No. 118; Forbes, 83, 84.

ceptance by an extraordinary messenger, that the drawee may accept before he hears of the bankruptcy. In the ordinary case, as the acceptor is presumed to have funds of the drawer in his hands, this rule is applicable, because intimation of the bill assigns these funds to the holder, though it is not accepted; and therefore the holder, being entitled to presume that the drawee has funds, will not be supposed to require fraud for procuring acceptance. But if the holder knows that the bill is to be accepted without value, for the drawer's accommodation, his concealment of the drawer's bankruptcy, actual or approaching, when he presents the bill, would probably deprive him of the benefit of acceptance, as the bill is presented by him, as well as accepted, on the understanding that the drawer is solvent, and able to indemnify the drawee for his acceptance. But such fraud would not be available against his indorsee. Further, it would be necessary, in such a case, to establish his knowledge that the bill was drawn merely for the drawer's accommodation; and this could not be proved in Scotland, except by his writ or oath, as the bill indicates the contrary.

Acceptance
after drawer's
death.

'In America, it is held that a bill drawn in the lifetime of the drawer may be accepted by the drawee after the death of the drawer, although he has knowledge of the fact. It is considered that the drawer's death does not act as a revocation of the bill when in the possession of a *bona fide* holder for value (a). In England, it seems to be thought that the same rule would be followed; but as the point has not been decided, the drawee is recommended to pause before accepting (b). In France, where the drawing of the bill is regarded even before presentment as a completed assignation of the drawer's funds in the drawee's hands, there would be no doubt that the acceptor was bound to accept after the drawer's death (c). In Scotland, where the assignation is not complete before the intimation given by presenting for acceptance, the point is not so clear; but if the draft was in the hands of a holder for value, it would be viewed as an irrevocable mandate, and the drawee would therefore be safe to accept.

Date of
acceptance.

'If an acceptance bears a date, it is taken at least as *prima facie*

(a) Story, § 250, founding on *Cults*
v. *Perkins*, 12 Mass. R. 206.

(b) Chitty, 193.

(c) Nougier, § 272.

evidence of the time when it was made (*a*), even when the date is in a different handwriting from the rest of the acceptance (*b*). When the acceptance bears no date, there is no presumption that it was made at the date of drawing; but, on the contrary, it is presumed that it was made afterwards (*c*). The presumption is, that it was made within a reasonable time after drawing, and prior to the term of payment (*d*).'

SECTION III.

MODE OF ACCEPTANCE.

'No acceptance is sufficient to bind or charge any person, unless it be in writing on the bill, and be signed by the acceptor or some person duly authorized by him (*e*). Such has always been the law of Scotland (*f*), and of the continental nations (*g*); but till the Mercantile Amendment Act of 1856, it was the practice in England to admit almost any sort of proof of acceptance, such as acceptances on separate writings, or even verbal acceptances (*h*). In England, and also in Ireland, the law is now the same as in Scotland (*i*).'

Acceptance must be by signature on the bill.

It has been suggested by a learned author (*k*), that, although a written promise to accept a bill, before or after it is drawn, is not, by our law, an acceptance, yet, in the holder's hands, it is a letter

A promise to accept, or separate acceptance, does not constitute the maker a party to the bill.

(*a*) See authorities quoted *antea*, p. 36, as to the date of drawing, and p. 177, as to the date of indorsing.

(*b*) In *Glossop v. Jacob*, 4 Camp. 227, 1 Stark. 70, this point was left by Lord Ellenborough, as a matter of mercantile usage, to the jury, who found for the plaintiff, on the ground that it was the practice for a clerk to date the acceptance before it was signed by the merchant. The objection was made by pleading that the date was not probative, and thus did not afford evidence that the time mentioned in the bill had elapsed between presentment and the date of the action.

(*c*) *Beghi v. Levi*, 1830, 1 Cr. and Jerv. 180. The bill was drawn on a Sunday. The acceptance was undated,

and there was no evidence when it was made. It was held that it must be taken to have been made after the date of drawing.

(*d*) *Roberts v. Bethel*, 16 Nov. 1852, 22 L. J. (C. P.) 69.

(*e*) 19 & 20 Vict. c. 60, § 11.

(*f*) See *antea*, p. 29, under "Subscription."

(*g*) Nonguier, §§ 321-327; Borchardt: Allgemeine Deutsche Wechselordnung, s. 76.

(*h*) Chitty, 196. In the case of inland bills the law was changed before the Mercantile Amendment Act, by 1 & 2 Geo. IV. c. 78, § 2.

(*i*) 19 & 20 Vict. c. 97, § 6.

(*k*) 1 Bell, 397.

of credit on the drawee for the amount; that, when the bill is drawn, the drawee's obligation is fulfilled, so that he cannot be asked to accept another draft for the same debt; and that the bill and letter referring to it operate together a complete assignment of the funds in the drawee's hands. This may be the law when the letter relates to a bill already drawn; since it then implies intimation of the draft, by which the assignment of funds is completed. But it has been decided that proof of a verbal promise to accept a bill, when tendered with this view, is incompetent (a). It may be also doubted whether a letter promising to accept bills not yet drawn operates, when they are drawn, as complete an assignment of effects in the drawee's hands as an acceptance. It has, however, been decided, that a party who promised to accept a bill for L.500 was bound for that amount, when the bill was drawn (b); and (c) when a party promised to honour drafts by another, to the amount of two-thirds of the value of a ship which the latter was building, he was found liable, in respect of his undertaking, to a third party who had discounted such drafts, though he had made other advances to the drawer to a larger amount than the two-thirds. 'If a person guarantee that another will accept certain bills, he is liable under his guarantee to pay their amount, if the drawee refuse to accept on the bills being presented to him at any time before maturity (d).'

But a signature
adhibited by
another to a
bill may be
adopted.

Although the signature of a party, as acceptor, be forged, he will be liable for its amount, if he says, on being asked, that it is his signature (e), or if he has previously paid several bills, accepted in the same handwriting (f), or even if he refrains from stating

(a) *Cullen*, 18 June 1833, 11 S. 733.

(b) *Shepherd v. Campbell*, 28 May 1823, 2 S. 346.

(c) *Smyth v. Hunter*, 26 Nov. 1830, 9 S. 76.

(d) *National Bank v. Robertson*, 3 Feb. 1836, 11 S. 402.

(e) In an English case, *Cooper v. Le Blanc*, 2 Str. 1050, which was an action against the indorser of a bill, who was proved to have acknowledged his indorsement, the C. J. was inclined, notwithstanding, to have admitted direct proof of its forgery (if

there had been any), though he refused to allow a proof by similitude of hands. But in *Leach v. Buchanan*, 4 Esp. 226, Lord Ellenborough held that an acceptor's acknowledgment of his signature excluded him from proving that it was forged, after he had thus given currency to the bill. See also *Frost v. North of Scotland Bank*, 16 June 1858, 20 D. 1135.

(f) *Barber v. Gingel*, 3 Esp. 60, per Lord Kenyon, C. J.; *Brown v. British Linen Co.*, 16 May 1863, 1 M'Ph. 793.

forgery, when personally cited in an action on the bill (*a*), or after receiving repeated charges for payment, more especially if the alleged forger is thereby enabled to escape (*b*). The mere circumstance, however, of a party whose name had been forged to a promissory-note not answering a letter for payment, or informing the creditor of the forgery, when the forger told it to her three days after, was held not to make her liable for the amount (*c*). There were other circumstances unfavourable to the creditor, who had suffered the forger to escape after he heard of the forgery. If a person gives bills to a third party as signed by him, though signed by another in his name, he will be liable for the amount (*d*). In Scotland, 'it was formerly thought that' the party would not be considered in these cases as an acceptor, but would be liable, on the ground of his having given a false credit to the bill (*e*). 'But it is now settled that a person adopting a signature makes himself liable as a party to the bill; and it is therefore held competent, in a suspension on the ground of forgery, to allow a counter issue of adoption (*f*).'

The only kind of acceptance which the holder of a bill is bound to take is an absolute acceptance, whereby the drawee engages to pay in terms of the bill (*g*). No form of words is necessary to constitute this kind of acceptance, provided the words express an obligation in terms of the bill. The usual mode of acceptance is for the acceptor merely to subscribe his name, 'it being understood, because nothing is said to the contrary, that

No form of words necessary to constitute an absolute acceptance.

(*a*) *Provan v. Mackay*, 29 June 1821, 1 S. 92.

(*b*) *Meiklem v. Walker*, 16 Nov. 1833, 12 S. 53.

(*c*) *M'Arthur v. Paterson*, 3 March 1825, 3 S. 607; see also *Boyd v. Union Bank*, 12 Dec. 1854, 17 D. 161; *Smith and Warden v. British Linen Co.*, 13 Feb. 1863, 1 M'Ph. 402.

(*d*) *Miller v. Little*, 22 Jan. 1831, 9 S. D. B. 328.

(*e*) On this ground, in the case of *M'Arthur v. Paterson*, note (*c*), two of the judges held, that although the party sued had been liable for the debt, she could not be subjected to a summary charge on the bill. But in

Miller v. Little, note (*d*), the defender was found liable in an action on the bills, as having adopted the signatures, by delivering them as genuine.

(*f*) *Findlay v. Currie*, 7 Dec. 1850, 13 D. 278.

(*g*) *Per Lawrence, J.*, in *Parker v. Gordon*, 7 East. 387. Vide also *Gammmon v. Schmoll*, 5 Taunt. 344. In *Boehm v. Garcias*, 1 Camp. 425, a bill drawn on Portugal, payable "in effective, and not in *vals reais*," was held not duly accepted when accepted payable "in *vals denari*." See also a case of the same kind stated by Beawes, No. 265.

the obligation undertaken is to pay as requested.' The subscription may be written at the bottom of the bill, immediately below the drawer's name, or across it (*a*). 'The position of the drawee's subscription seems immaterial, provided it be there, for it may be written above (*b*) as well as below that of the drawer; and as it has been held that an indorsement may be written on the face of a bill (*c*), an acceptance may, as is sometimes the case, be indorsed.' When a bill is drawn payable at a certain time after sight, the date of presentment must be marked, in order to regulate the term of payment (*d*). It has been recognised as the practice in London, when a check on bankers is presented after four o'clock, to mark it payable next day at the clearing house; which marking is accounted a good acceptance, such as the holder may safely take (*e*). When a bill is made payable generally in London or any other large town, the holder may insist that the drawee should subjoin to his acceptance some house where it will be paid, as the holder may not otherwise know where to find him, and if he refuse, the holder should protest for non-acceptance (*f*). How far such an acceptance can limit the payee's right to demand payment elsewhere, shall be afterwards considered.

Acceptance
revocable while
in acceptor's
hands,

When a bill is once accepted and issued, the acceptance is irrevocable. But it has been much discussed in England, whether a drawee may cancel his acceptance before re-delivery of the bill, or whether the creditor does not acquire a complete right in it without re-delivery (*g*). The question was held to be settled in a comparatively recent case (*h*), where a bill which had been left with the drawee for acceptance was returned with an obliterated acceptance, but without evidence to account for the obliteration; and, in that case,

(*a*) Chitty, 199; *Gray v. Milner*, 1819, 3 Moore, 90.

(*b*) *Dalrymple v. Bryson*, 13 Dec. 1810, H. 67.

(*c*) *Antea*, p. 181, note (*c*).

(*d*) Beawes, No. 266, says, that in this case the acceptance must be dated. But it is the date of presentment which regulates the term of payment, and there may be some difference betwixt it and the date of acceptance.

(*e*) This was held in *Robson v. Bennett*, 2 Taunt. 358.

(*f*) This was held in *Gregory v. Walcup*, Comyns, 76; and *per Holt*, C. J., in *Mitford v. Walcot*, 1 Lord Raym. 575.

(*g*) *Trimmer v. Oddie*, 1800, 2 Smith Rep. 338; *Thornton v. Dick*, 1803, 4 Esp. 270; *Bentinck v. Dorrien*, 1805, 6 East. 199; *Raper v. Birbeck*, 1812, 15 East. 17; *Novelli v. Rossi*, 1831, 2 B. and Ad. 757.

(*h*) *Cox v. Troy*, 29 Jan. 1822, 5 B. and A. 474.

the Court of King's Bench, without even hearing the drawee, decided that he could not be liable as an acceptor. This doctrine, indeed, appears to be consonant with sound principle ; for acceptance, like any other contract, does not seem to be complete till communicated to the other party ; and, till then, the drawee, though he has resolved to accept, may change his mind, so that his signature is merely a private marking, which he may efface at pleasure. The obliteration of his signature, if it injures the bill, may afford a claim of damages against him, but cannot make him liable as acceptor. But there does not seem to be any real injury ; for the holder will have an immediate claim on it against the other parties, as on a bill of which acceptance is refused ; and it may even be afterwards indorsed on their credit, though it does not seem to be fit for circulation as a bill, when the drawee has refused to accept (*a*). The same opinion is expressed by Pothier, nearly on the grounds which have been now stated (*b*).

Re-delivery of the bill accepted is the most common mode by which the drawee apprises the other party of his acceptance, and thus renders it irrevocable. 'It would seem that, even with the holder's consent, he cannot now revoke, because the drawer and indorsers have acquired an interest in the acceptance (*c*).' Any other mode of intimating it would have the same effect, though the bill should still remain with the drawee, since he would be considered, in that case, as holding it for the creditor's behoof. Accordingly, in a case (*d*), where the drawee admitted his acceptance, but retained the bill, the Court of King's Bench held that the creditor did not require to aver re-delivery, but might give him notice to produce it. But, till the acceptance is intimated to the creditor by delivery, or otherwise, it would seem that the drawee may cancel it at pleasure.

but not after
re-delivery.

It is a question, whether a drawee signing his name, but delivering the bill thus signed to a third party, with orders not to give it up till certain conditions are fulfilled, is to be held as bound by his acceptance, without regard to such conditions. This was once held (*e*), where a drawee having intrusted several bills thus signed

And the
drawee must
not retain the
bill.

(*a*) *Vide* Chitty, 207.

(*c*) Chitty, 206.

(*b*) Pothier, No. 44 ; *vide* also Dupuy
de la Serra, c. 10, p. 80.

(*d*) *Smith v. M'Lure*, 5 East. 476.

(*e*) *Campbell v. Campbell*, 21 Nov.

to his agent, not to be given up except in certain events, but the bills having been forced from the agent by a decree of the Sheriff, the Court decided, in a reduction of the decree, and an action on the bills by the payee against the drawee, that the latter was liable absolutely by virtue of his acceptance. But the soundness of this decision may be doubted. It was said that the bill was the payee's document, which he might recover. But he must in that case have got it subject to the conditions under which the agent held it, and he does not, therefore, seem to have had more right, by virtue of the acceptance, than if the drawee had intended to erase his acceptance, but the bill had been forced from him before he could do so. If the drawee neither would say that he had accepted, nor return the bill, the creditor's remedy was to protest for non-acceptance, and bring an action for recovery of the bill. But such a protest would have excluded the plea of acceptance; and he could not, by merely forcing back the bill, make out an acceptance which the drawee had never completed by intimation, and which a protest, the proper remedy, would have negatived. An onerous and *bona fide* holder of such a bill, however, would have had a claim on the acceptance.

SECTION IV.

DIFFERENT KINDS OF ACCEPTANCE.

Conditional acceptance is admitted.

Conditional acceptance, whereby the acceptor's obligation to pay is made to depend on a contingency, is admitted (a). There is a distinction between a conditional acceptance, and a bill *drawn* payable on a contingency; the radical obligation, in the former

1781, M. 1478. *Per curiam*. "The acceptor of a bill is not entitled to retain it an hour, or to adject any condition to his acceptance, without the holder's consent. It is the holder's document of debt against the drawer, and must immediately be returned to him."

(a) *Sproat v. Matthews*, 1 T. R. 182. It is recognised in the following cases: *Anderson v. Hick*, 3 Camp. 179; *Milne v. Prest*, 4 Camp. 393; *Holt, C. N. P.* 182, *per Gibbs, C. J.* :

Langston v. Corney, 4 Camp. 176, where it was held that the plaintiff could not recover under a count as for an absolute acceptance, because the acceptance was conditional; and *Siras v. Cox*, 1 Marsh. 176, where an acceptance depending on the condition of the defendant getting possession of a house was held to be unavailing, as he had not got possession. *Vide also Gammon v. Schmoll*, 5 Taunt. 341, where the same principle is implied.

case, being absolute, as the drawer is bound, at all events, to make payment to the holder; whereas, if a note be granted, or a bill drawn conditionally, the whole obligation will be contingent, because the acceptance follows the tenor of the draft.

The English Reports afford numerous examples of conditional acceptance; for instance, to pay "as remitted for (a)," or "on account of the ship Thetis, when in cash, for the said vessel's cargo" (b), or on condition of getting a certain house by a given term (c), or when certain goods are sold (d), or when certain funds come to hand (e). Lord Stair also mentions similar examples; such as, "if provisions come betwixt and the day," or if there are goods or bills enough on hand (f). But an acceptance to pay, "in case the owners of the Queen Anne would not," was found to be absolute as to the payees (g); as merely implying that the acceptor should not be asked to pay till he had applied to these parties, and not depending on the condition of the payees first applying to them. It has been shown that an acceptance "as cautioner" is deemed an absolute acceptance with reference to the holder of the bill (h). In all cases of conditional acceptance, the acceptance becomes absolute when the condition is fulfilled (i). Its fulfilment must be specially averred and proved (k). Such acceptances, therefore, in Scotland, could only be made effectual by an ordinary action, not by summary diligence.

The conditions of an acceptance will not be effectual against an onerous and *bona fide* holder of the bill, unless annexed to the acceptance. A condition in a separate writing will not be effectual, if the holder, or the person under whom he claims (l), has got no notice of it. In one case, effect was given to a separate writing qualifying the defendant's obligation, on the express ground that the bill was not in the hands of an onerous indorsee (m). In all

provided the condition be written on the bill.

(a) *Per Lee*, C. J., in *Banbury v. Liott*, 2 Str. 1211.

(b) *Julian v. Sherbrooke*, 2 Wils. 9.

(c) *Swan v. Cox*, p. 222, note (a).

(d) *Smith v. Abbott*, 2 Str. 1152.

(e) *Mendizabal v. Machado*, 6 C. and P. 218; 2 M. and Sc. 841, S. C.

(f) *Stair*, i. 11, 7.

(g) *Wilkinson v. Lutwydge*, Str. 648.

(h) *Antea*, 63; 212.

(i) This is implied in *Banbury v. Lisett*, *antea*, note (a), and in all the other cases already cited. Indeed, it results from the nature of the case.

(k) *Swan v. Cox*, *antea*, 222, note (a).

(l) *Bayley*, 197.

(m) *Bowerbank v. Monteiro*, 4 Taunt. 844, *per Gibbs*, J.

questions with indorsees, the acceptor must prove that they were aware of such separate qualifications. Parole evidence of these qualifications does not seem admissible even in England (*a*), and it would not be admitted in Scotland, though the holder was aware of it, to qualify an absolute written acceptance. But when the terms of the acceptance are ambiguous, parole evidence would probably be admitted to explain them (*b*).

Acceptance payable to drawee, or to the person entitled to payment.

It has been said (*c*) that, when the drawee of a bill is creditor of the holder for its amount, he may accept it "payable to myself;" and, that if his claim is liquid, the holder cannot reject this acceptance as conditional, as the payment "to myself" is a payment to him. This may be a good defence in an action by the holder against the drawee for non-acceptance; but it cannot prevent the holder from protesting the bill, and pursuing his recourse against the other parties, in respect that there is not an acceptance in terms of the bill. Nor can it hinder the holder from indorsing the bill to a third party, though it may be questioned whether such an indorsation would carry the drawer's funds in the drawee's hands, or whether the latter, in the event of his having a counter claim against the drawer, would not be entitled to plead compensation or retention. It has been said, that if the funds in the drawee's hands have been arrested by a creditor of the holder (*d*), he may accept "payable to the party entitled to the money." But this is no acceptance, and it would probably be wisest for him to refuse acceptance on account of the arrestment. On the other hand, he would be obliged to accept, if the bill was afterwards presented to him by an indorsee, as the fund is conveyed away by the indorsement from the former holder.

Partial acceptance.

A partial acceptance engages to pay only part of the sum in

(*a*) Chitty.

(*b*) *Per* Gibbs, C. J., in *Swan v. Cox*, *antea*, 222, note (*a*). In this case, a condition in the defendant's acceptance, viz., that the bill should be paid if a certain house was given up to him at a fixed term, was held to refer to a separate contract, by which the (supposed) owner of the house had agreed to sell it to the acceptor at a certain price.

(*c*) Dupuys de la Serra, C. 8; Pothier, No. 47. Although conditional acceptances must now be treated in France as refusals to accept, this curious form of acceptance seems still permitted. Its effect seems to be very doubtful. Nougier, § 340.

(*d*) *Ibid.*; Nougier, § 341. The form is: "*Accepté pour payer à qui sera par justice ordonné, avec un tel saisissant.*"

the bill. Though the drawee may thus accept for less than the amount, he cannot, by accepting for more, give the holder a claim beyond it, since his right, as well as the drawee's acceptance, is limited by the bill (*a*). It was once maintained in England, that a partial acceptance, though it might be sued on as a separate agreement, could not found a good action *on the bill*, as the other parties might object to dividing the obligation into separate acceptances, and subjecting them to separate actions. This objection was inapplicable to the case in question, which was a partial acceptance *by the drawee*, who, being presumed to do so as the drawer's debtor, could have no recourse on the bill against any of the other parties, so that they could not be liable to more than one action by the holder on non-acceptance or non-payment. On the other hand, partial acceptances, *supra* protest, for the honour of the drawer, or any other party, are not made according to the tenor of the bill, but are authorized by custom, to save the credit of the previous parties, who cannot therefore object to a number of claims of recourse against them by the acceptors, because such claims might be extinguished by their paying the bill, for which they are liable, from its non-payment by the drawee. Such a partial acceptance, therefore, whether given by the drawee, or, on his refusal, by an acceptor *supra protest*, authorizes action or diligence on the bill (*b*).

An acceptance may vary from the tenor of the bill, as to time (*c*), or place of payment (*d*). The bill itself must, in its original constitution, be payable in money, and it always remains

Varying
acceptance.

(*a*) Pardessus, No. 269.

(*b*) The case referred to in the text, where the objection above mentioned was repelled, after full discussion, is *Wegerstoffs v. Keene*, 1720, 1 Str. 214. The same kind of acceptance is recognised by Molloy, No. 20 of his title on Bills, Marius, 68, and Pothier, No. 48. *Petit v. Benson*, 1697, Comb. 452.

(*c*) *Russel v. Phillips*, 11 Feb. 1850, 19 L. J. (Q. B.) 297. Molloy, No. 28, *h. t.*, and *Price v. Shute*, mentioned by him in the same place, in which, according to the construction of it by Buller, J., in *Master v. Miller*, 4 T.

R. 320, effect was given to such an acceptance in an action against the acceptor. *Vide also Walker v. Atwood*, 11 Mod. 190, where an acceptance of a bill which had no term of payment, promising to pay at a certain future day, was held good in an action against the acceptor, although he objected that this was not an acceptance in terms of the bill; because, from specifying no term of payment, it must be held to have been payable at sight.

(*d*) *Vide Sebag v. Abithol*, 4 M. and S. 466, and *Cowie v. Halsall*, 4 B. and A. 198-9, *per* Abbot, C. J.

so with reference to the drawer and the other parties. But mercantile usage has introduced the limitation now mentioned as to the acceptance. 'The variation must be expressed in the clearest language; and no expression in the acceptance which can be attributed to mistake merely or misunderstanding of the terms of the bill, will be taken to vary them. Thus, where a bill which fell due on 11 January 1857, was noted in the acceptance as "due, 11 December 1856," this was treated as a mere memorandum founded on a mistaken reading of the bill, and not as a variation evincing a deliberate intention to accelerate the term of payment (a).'

Holder's duty
as to such
acceptances.

When the drawee offers an acceptance varying from the tenor of the bill, whether as conditional, partial, or otherwise, the holder may refuse it if he pleases, and protest for non-acceptance (b). In a case (c) where a bill was drawn on two parties, one of whom accepted simply and the other *for his half*, the Court of Session decided that the latter "ought to have accepted simply, and that he was liable *in solidum*." The ground of this decision probably was, that he was liable at any rate *in solidum*, as a copartner of the other acceptor. But it does not appear consistent with principle to hold his acceptance *for half* a sufficient ground for subjecting him to the whole. The utmost that the holder could do in such a case, was to protest the bill, as to the residue, for non-acceptance. On the other hand, if the holder takes a limited acceptance, it will regulate his claim against the drawee (d).

His claim
against the
previous
parties.

As to the previous parties, the holder will lose all claim against them, if he takes an acceptance varying from the bill, without giving them immediate notice (e). When the drawee accepts only for part of the bill, the holder may safely take the acceptance; but, to preserve his recourse, he must protest for non-acceptance and non-payment as to the residue (f). If an acceptance, though for

(a) *Fanshawe v. Peel*, 17 Mar. 1856, 26 L. J. (Ex.) 314.

(b) *Per* Lord Ellenborough in *Boehm v. Garcias*, *antea*, p. 219, note *g*, and other cases there cited.

(c) *Naughton v. Ritchie*, 10 Dec. 1712, Morr. 1490-1.

(d) *Per* Lawrence, J., in *Parker v. Gordon*, 7 East. 385; *Gammon v.*

Schmoll, 5 Taunt. 344; and *per* Bayley, J., in *Sebag v. Abithol*, 4 M. and S. 466.

(e) Bayley, 253-4, *per* Bayley, J., in *Sebag v. Abithol*, note (d). The same doctrine is taken for granted in *Paton v. Winter*, 1 Taunt. 422-3.

(f) Marius, 68 and 86; Chitty. 201.

the whole sum, is made under some condition, or under a limitation as to time, there is a doubt whether the holder taking it will preserve his recourse by notification to the other parties; or whether he ought not likewise to protest for non-acceptance, so far as the acceptance does not agree with the tenor of the bill, and thereupon take it; or whether he can preserve his recourse, without protesting generally for non-acceptance, and thus rejecting the acceptance altogether. This last opinion is held by Lord Stair (*a*). But it would appear that the payee may safely take such an acceptance as well as a partial acceptance (*b*). He must protest, however, for non-acceptance, so far as the acceptance is not in terms of the bill, since the drawee disobeys the mandate in the bill, when he accepts under a condition not authorized by it, as much as when he accepts only for part of it (*c*). If the holder means to avail himself of the limited acceptance, he must set it forth specially in his notice and protest, since any act which indicates that he does not acquiesce in it, will, as to the drawee, cut him off from the benefit of it (*d*). 'The prudent course, in all cases where the holder is offered a varying acceptance, is for him to communicate the terms of it to the previous parties, and obtain their written consent, before he agrees to receive it (*e*). If he fail to do this, though he give immediate notice, he may find himself without recourse; for if he take an acceptance by which he gives the acceptor (who is the principal debtor) more time without the consent of the previous parties (who

(*a*) i. 11, 7.

(*b*) Mr Bell (1 Comm. 398) says: "The porteur is not *bound* to take such conditional acceptance; and he is not *safe* so to do, without giving immediate notice to the drawer and other parties, so as to prevent them from pleading a discharge of their responsibility."

(*c*) Marius, 88, states, that when the drawee accepts, payable at a longer time than that allowed in the bill, the holder may take the acceptance, and must yet protest for non-acceptance, in so far as the acceptance is not conformable with the bill. The same principle seems applicable to every

other kind of variation in the acceptance. Bayley, 253-4, and Chitty, 201, speak generally of notice of the conditional nature of the acceptance, but do not mention the necessity of a protest.

(*d*) In *Sproat v. Matthews*, 1 T. R. 182, the holder was found to have waived the benefit of what was held to be a conditional acceptance, by protesting the bill generally for non-acceptance. The same doctrine, as to the effect of a protest for non-acceptance in precluding the party protesting from pleading a previous acceptance, was held in *Bentinck v. Dorrien*, 6 East. 199.

(*e*) Chitty, p. 201.

are, in fact, cautioners), he ought, on principle, to lose his recourse against them (a).'

Is the drawee
bound to
accept?

A question has been raised (b), How far a debtor of the drawer is bound to accept bills drawn on him to the amount of the debt, under the penalty of damages for non-acceptance? If he has agreed to accept, he is bound to do so, whether he is the drawer's debtor or not. But, if not, the only reason why he can be bound to accept is, that there are in his hands, not merely effects of the drawer, but cash, with which he can pay the bill when due. On this principle, it has been shown (c), that an unaccepted bill cannot operate an assignment to the payee of the drawer's funds in his hands, unless the funds are in cash at the date of the presentment and protest. The drawer's debtor, therefore, cannot be bound to accept a bill even for a sum not exceeding his debt, unless it is made payable on a day at or after the expiration of his stipulated term of credit, as it is only then that he has cash *belonging to the drawer* to meet the bill (d). Under this condition, he seems bound to accept, as it can make no difference to him whether he pays the drawer himself, or his assignee. The assignment, as already shown, is completed, without his consent, by the draft and protest for non-acceptance; and, though he would, but for acceptance, be liable only to an ordinary action by the payee, instead of summary diligence, he cannot plead such a distinction as a legal excuse for not accepting, when he is bound, in all events, to pay the money, without either action or diligence (e).

(a) See Chitty, 201. It seems to the Editor to be very doubtful whether the holder has any other choice than that of either receiving a conditional acceptance and abiding by its terms, or refusing it altogether, and whether he can, as the text would imply, receive it as to the acceptor, and refuse it as to the previous parties, or in other words, hold the acceptor as bound conditionally, and the others as bound absolutely.

(b) Glen, 126, 2d edition.

(c) *Antea*, p. 107.

(d) In an early case, *Russell v. Learmont*, 22 Feb. 1671, 2 Br. Suppl. 523, a drawee was found not to be

liable for exchange and other expenses for not accepting, as there was only a disputed claim by the drawer against him.

(e) Chitty, p. 192, founding on Pardessus, Nos. 361-4, says that a debtor, though indebted to the drawer in the full amount, is not bound to accept a bill, or liable in damages for non-acceptance, unless he have promised to accept; in which case, as decided by *Smith v. Brown*, 6 Taunt. 440, the drawer, but not the holder, may sue for damages if he fail to accept. The present law of France seems to be the same. Nouguiet, §§ 291-5.

SECTION V.

EFFECT OF ACCEPTANCE.

It has been shown (a), that the drawee is presumed, from acceptance, to have value belonging to the drawer in his hands, whether the bill contains the words "value received" or not, and whether it is made payable to the drawer or to a third party. It is from this presumption that the drawee accepting becomes liable primarily as debtor, and that the drawer and indorsers are liable only on his failure to pay (b). 'The acceptance "imports an engagement upon the part of the acceptor, to the payee or other lawful holder thereof, to pay the bill according to the tenor of the acceptance, when it becomes due, upon due presentment thereof. If, having accepted, he refuses at its maturity to pay it, he will be bound to indemnify the drawer for all losses and expenses which he may have incurred thereby" (c).'

The acceptor becomes principal debtor,

In bills admitted to be accommodation-bills, which are drawn without real value in the drawee's hands, to raise money by discounting them, the acceptor will be presumed to have received the money, as the value in respect of which he accepted; and this principle cannot be redargued in Scotland, except by the drawer's writ or oath (d). In a case (e), where a blank bill was

even in accommodation-bills.

(a) *Antea*, p. 54 *et seq.*

(b) *Per Mansfield, Heylin v. Adamson*, 1758, 2 Bur. 669; *per Cresswell*, in *Jones v. Broadhurst*, 9 Man. Gr. and S. 181.

(c) Story, § 113. It is on the principle that the acceptor is principal debtor that a payment, for which the receipt is general, is presumed to have been made by him. See *post*, Chap. V. § v. p. 265.

(d) This was found in *Wallaces v. Barrie*, 29 Dec. 1793, M. 1483, and was held in *Berry v. Murdoch*, 15 Feb. 1822, 1 S. 328. The same doctrine was also recognised in an action by the drawer against the acceptors, admitting that the bill had been signed to

raise money for a third party, and that drawer and acceptors were bound each to the extent of one-third; it being decided that, except in so far as the drawer's liability was admitted, the acceptors must be liable, unless they disprove the drawer's claim by his writ or oath: *Macgregor v. Gibson*, 19 Feb. 1831, 9 S. 483. *Vide also Percival v. Frampton*, 3 Dowl. P. C. 748, where the same principle was enforced as to the presumption of value between the maker of a note and the holders, in an action by them against a person who was said to have indorsed it for the maker's accommodation.

(e) *Smith v. Taylor*, 27 Feb. 1824, 2 S. and D. 755, F. C.

accepted by one person for the accommodation of another, and also by the party accommodated, and was filled up by a third party, who likewise drew it in his own favour (he having given value for it, however, to the party accommodated), the drawer's knowledge, that it was an accommodation-bill, was held not to deprive him of the privileges of an onerous holder. It was presumable that he had given value for it, unless the contrary had been established by his writ or oath. In another case (*a*), where a debtor got a promissory-note from a third party payable to his creditor, and then gave it to him, without indorsing it, guaranteeing its payment by a separate letter, it was held (although the payee admitted on oath that he gave no value directly to the granter of the note), that he was, notwithstanding, entitled, as an onerous holder, to recover from him. A similar decision was afterwards given on the authority of this case, under nearly similar circumstances (*b*).

Acceptance admits the drawer's signature, and power to indorse,

Acceptance is an admission of the drawer's signature, and precludes the acceptor from afterwards pleading against a *bona fide* holder that it was forged (*c*). “The acceptor of a bill of exchange is not at liberty to show that it was not drawn by the party who appears to be the drawer” (*d*). The acceptance also admits that the person who draws the bill is competent to do so (*e*); and, having thus admitted the authority to draw, the acceptor cannot, in a question with an innocent onerous holder, dispute the power to indorse (*f*).

(*a*) *Dirom v. Boyd*, 7 June 1827, 5 S. and D. 773.

(*b*) *Allan v. Galli*, 5 June 1829, 7 Sh. and D. 706, F. C.

(*c*) In *Price v. Neal*, 3 Burr. 1354, two bills being presented by an onerous holder to the drawee, one of which he paid without accepting, and the other he both accepted and paid; and he having afterwards brought an action to recover the money from the holder, on the ground that the drawer's signature was forged, the Court of K. B. dismissed the action, holding, that he ought to have ascertained the genuineness of the drawer's signature before accepting or paying, and that having given a credit to both bills, he must bear the loss. Similar doctrine was

laid down by Buller, J., in *Smith v. Chester*, 1 T. R. 655, and by Dampier, J., in *Bass v. Clive*, 4 M. and S. 15. In this last case, an objection, that a bill had been drawn by E. Needham and Co., whereas there was only one person so trading, was held to be excluded *quoad* the defendants, by their having accepted the bill thus drawn, which was made payable to “our order,” i.e. to the order of the drawers.

(*d*) *Per* Coltman, in *Sanderson v. Collman*, 1842, 4 Man. and Gr. 209, 11 L. J. (C. P.) 270, where it was held, on a review of all the preceding cases, that an acceptor could not plead that the drawer's signature was forged.

(*e*) Story, § 113.

(*f*) Chitty, p. 382.

Thus, if he accept a bill drawn by a minor (*a*), or a married woman (*b*), or a bankrupt (*c*), or a company not authorized to draw bills (*d*), or a fictitious company (*e*), or person (*f*), he cannot challenge the drawer's indorsation in the hands of an innocent holder for value. And if he accept a bill to which the drawer's signature has been forged, it would seem that he cannot object to an indorsement in the same handwriting (*g*). It is hardly an exception to this rule, when it is held that the admission (by acceptance) of an agent's right to draw is not an admission of his power to indorse, for authority to do the one is not necessarily authority for the other (*h*). In the cases above alluded to, the disqualification being applicable equally to the power to draw and to the power to indorse, is held to be waived as to the latter when it is waived as to the former (*i*).

But his acceptance does not preclude him from challenging any of the indorsements, 'other than the drawer's,' since he is supposed, when he accepts, to look only at the drawer's signature, his account with him being alone affected by the acceptance (*k*). 'This holds even though he have examined the indorsation before he accepted, and have satisfied himself that it was genuine, before he put the bill again into circulation (*l*).' But it cannot be pleaded, that an acceptor was not bound to notice the condition annexed to an indorsement; for (*m*) when a person accepts a bill after a conditional

but not the indorsations.

(*a*) *Taylor v. Croker*, 1802, 4 Esp. 187; *Jones v. Darch*, 1817, 4 Pine, 300.

(*b*) *Smith v. Marsack*, 10 Nov. 1848, 18 L. J. (C. P.) 65. See *antea*, p. 136.

(*c*) *Drayton v. Dale*, 1823, 2 B. and C. 293; *Pitt v. Chapelow*, 7 June 1841, 10 L. J. (Ex.) 487; *Braithwaite v. Gardiner*, 27 Jan. 1846, 15 L. J. (Q. B.) 187.

(*d*) *Halifax v. Lyle*, 29 Feb. 1849, 18 L. J. (Ex.) 197.

(*e*) *Bass v. Clire*, 1815, 4 Camp. 78; *antea*, p. 230, note *c*.

(*f*) *Cooper v. Meyer*, 10 B. and Cr. 469.

(*g*) *Duck v. Beeman*, 25 Feb. 1843, 12 L. J. (Ex.) 198.

(*h*) *Robinson v. Yarrow*, 7 Taunt. R. 455; *Allport v. Meek*, 4 Carr. and Pay. 267.

(*i*) Even in the case of agencies, when the agency, if good to draw, is equally good to indorse, the acceptor cannot challenge the agent's indorsement; for example, where he knowingly accepts a bill drawn *per procura* tion of a party deceased. *Ashfield v. Bryan*, 20 Jan. 1863, 32 L. J. (Q. B.) 91.

(*k*) This was the doctrine held by the Court of King's Bench in *Smith v. Chester*, cited p. 230, note *c*. Vide *Bayley*, 464, note 4.

(*l*) *Roberts v. Tucker*, 4 Nov. 1854, 24 L. J. (Q. B.) 46.

(*m*) *Robertson v. Kensington*, *antea*, p. 185, note *d*.

indorsement, and pays it to an indorsee of this conditional indorsee, while the condition of the first indorsement is unfulfilled, he is liable in second payment to the first indorser, being bound to look at the conditional indorsement as a limitation *ex facie* of the bill, in the title of the party claiming payment.

SECTION VI.

DISCHARGE OF ACCEPTOR.

How acceptor
may be dis-
charged.

The acceptor's liability cannot, in general, be discharged except by payment, by himself or the drawer, or by release (*a*). 'As expressed by one of the English judges: "He who comes under the character of acceptor, makes himself liable as such in all circumstances; and nothing can discharge him but payment, or release" (*b*).' Besides, it has been seen (*c*) that any nullity affecting an acceptance, according to the law of the country where it was made, or was to be performed, will prevent it from being enforced even in this country.

Payment, and its effect in discharging the acceptor, shall be discussed in the next chapter.

At present we shall consider the other mode of discharging him, viz., release; and as connected with the same subject, we shall also consider the right of an accommodation acceptor after release to indemnity from the parties whom he has accommodated.

(*a*) Marius, 85. *Bacon v. Searles*, 1 H. Bl. 188, illustrates the effect of payment, even by the drawer, in discharging the acceptor; an indorsee, who had been partly paid by the drawer, being there found not entitled to recover from the acceptor, except for the residue. It was said by Lord Loughborough, C. J., that the drawer, by paying the bill, releases the acceptor from his undertaking [to the indorsees], and that, if the acceptor should pay over again, the drawer would be entitled to recover from him

the money paid as part of his funds which he should not have given up. A holder who has raised an action against the acceptor, may take payment of the principal from the drawer, and still proceed with the action to the effect of recovering expenses. *Goodwin v. Cremer*, 8 June 1852, 22 L. J. (Q. B.) 30.

(*b*) *Per* Heath, J., in *Fentum v. Pocock*, 1813, 5 Taunt. 190. The same general doctrine is also laid down by Mansfield in this case.

(*c*) See *antea*, p. 84 *et seq.*

1. *Release.*

Such release must be granted by the holder of the bill, who, being the person entitled to enforce payment, can alone renounce it. It may be either express or implied, or in law language, a release *rebus ipsis et factis*.

(1.) Express Release.

By the law of Scotland, no express discharge of a bill or note is valid, unless granted by the holder in writing; as obligations constituted by writing cannot be extinguished without writing (a). A verbal discharge, therefore, will not be effectual, as in England (b). A written discharge may be on the bill, or separate from it. 'A separate release is, of course, good against the party who grants it (c).' But the acceptor is not secure, unless it is written on the bill, or unless he gets up the bill, since it may otherwise be indorsed to a third party, who, as already shown (d), will not be affected by payments that do not appear *ex facie* of the bill. It has been held (e) no defence to the drawer of a bill against an action by indorsees, that the debt was extinguished by bill transactions between the pursuers and the acceptor, on which the former were the debtors of the latter, no allegation of specific payments having been made, or written evidence adduced to counteract the presumption arising from the bill.

Express
release must be
in writing.

(2.) Implied Release.

Such conduct by the holder, as can only be accounted for by his having released the acceptor, may be proved by any sufficient

Implied
release.

(a) *Black v. Bell*, 22 Feb. 1831, 9 S. 486. *Tait on Evidence*, 320 *et seq.*; *Dickson on Evidence*, vol. ii. p. 393 (§ 606). Even when the sum is below L.100 Scots, parole evidence of payment is incompetent; *M'Donald v. M'Gregor*, 10 Mar. 1803, H. 499.

(b) A discharge of this kind, but accompanied by other circumstances, received effect in *Black v. Peel*, cited in 1 Douglas, 248-9. The same gene-

ral doctrine was assumed in *Whatley v. Tricker*, 1 Camp. 35, and *Parker v. Leigh*, 2 Stark. 229; and in a recent case, *Foster v. Dawber*, 30 June 1851, 20 L. J. (Ex.) 385, the point was considered too well settled to admit of further discussion.

(c) *Cox v. Tait*, 29 June 1843, 5 D. 1283.

(d) *Antea*, 189 *et seq.*

(e) *Henderson v. Elliot*, 20 May 1824, 3 S. 30.

evidence, and will constitute a discharge *rebus ipsis et factis*. It is difficult to state, *a priori*, what circumstances will thus amount to a discharge. The holder's delay to claim against the acceptor for less than the period of the sexennial prescription will not, in itself, discharge him. The effect of delay to enforce the debt for this whole period shall be considered in the chapter on Prescription.

Illustrations
from law of
England,
where release
held to be
proved.

The facts stated in some of the English cases would probably be held sufficient in Scotland to infer a discharge. Thus (a), an acceptor was found to be discharged by the holder writing in his bill-book that the acceptance was "at an end," and keeping the bill for three years afterwards without suing him. In another case (b), the acceptor was discharged by the circumstance of the payee, after getting a partial payment from the drawer, taking a written promise from him on the bill to pay the residue, and thereafter making no demand on the acceptor for three years. Again (c), where the defendants were alleged to have accepted bills on the security of a consignment of tobacco made to them to be sold on commission, and which they had no inducement to accept, but the commission on the sales, the holder was found to have discharged them, supposing that they had accepted, by agreeing, in a written memorandum, to take the consignment off their hands, and sell it at his own risk, for payment *pro tanto* of the bills. These cases would probably have been held, in Scotland, to infer a discharge.

and where
release held
not to be
proved.

But it has been found, that an acceptor was not discharged by the circumstance of the holder, who learned only after the bill became due that it was an accommodation-bill, having applied to the drawer for payment, and allowed several years to elapse without asking it from the acceptor (d), or by his offering to take the drawee's affidavit that his acceptance was a forgery (the affidavit not having been sworn, which Lord Kenyon said would have been sufficient, but only drawn and engrossed (e)), or by his giving time to the drawer (f), or by his taking payment from a debtor of the drawer, upon a receipt on the bill, and on condition of giving him

(a) *Walpole v. Pultney*, cited 1 Douglas, 248.

(b) *Ellis v. Gallindo*, cited 1 Douglas, 249.

(c) *Mason v. Hunt*, 1 Doug. 297.

(d) *Dingwall v. Dunster*, 1 Doug.

247. A similar decision was given in *Farquhar v. Southey*, 2 C. and Pay. 497, 1 M. and Malk. 14.

(e) *Stevens v. Thacker*, Peake's C. N. P. 187.

(f) *Ragget v. Azmore*, 4 Taunt. 730.



is name in an action against the acceptor, combined with the circumstance of this party telling the acceptor that he would not be troubled about the bill (*a*). Such circumstances would have been insufficient also in Scotland to discharge the acceptor.

On the other hand, a general discharge by the holder of a bill to the acceptor, after it fell due, though without particular notice of the bill, or a discharge with reference to a series of transactions of which the bill formed a part, would be held to discharge the acceptor (*b*). A general release by the drawer, even after he has transferred his right in the bill, will discharge all his ground of action against the acceptor from being afterwards obliged to pay the bill, such cause of action having arisen previous to the discharge, as it draws back to the date of acceptance (*c*). But such a release will not discharge an acceptance granted after its date, though the bill was drawn previous to it, since the acceptance was not a subsisting debt at the time of the release (*d*). In a case where the defendant's creditors, and, among others, the payee of the bill sued on, of which the defendant was acceptor, had executed a general release, on having a certain composition secured by promissory-notes, and by the assignment of certain debts, it was held that the defendant was bound to tender the notes, not the creditors to apply for them, and that, therefore, as there was no evidence of tender, the release did not exclude an action on the original bill (*e*). The payee's appointing the maker of a note, or acceptor of a bill, his executor, has been held to be a release (*f*).

Further
illustrations.

2. *Discharge and Indemnity of Accommodation Acceptors.*

It was once decided by Lord Ellenborough at *Nisi Prius*, that when the holder of a bill knew that it was accepted for the drawer's accommodation, he lost his claim against the defendant (acceptor), by giving the drawer time, after a partial payment, to pay the balance; the case being held the same, with regard to him, as if the bill had been drawn by the defendant, and accepted by the

Accommodation acceptor is not discharged in any other way than an ordinary acceptor.

Law of England.

(*a*) *Adams v. Gregg*, 2 Stark. 531.

(*d*) *Draggs v. Netter*, 1 Ld. Raym. 65.

(*b*) See *Joel v. Johnstone*, 20 Jan. 1860, 22 D. 430.

(*e*) *Cranley v. Hilary*, 2 M. and S. 120.

(*c*) Per Lord Ellenborough in *Scott v. Lifford*, 1 Camp. 246.

(*f*) *Freakly v. Fox*, 9 B. and Cr. 139.

drawer (a). But this doctrine was repeatedly questioned in subsequent cases (b); and, at last, it was unanimously overruled by the Court of Common Pleas (c), who found that an acceptor is always primary debtor with reference to the holder, whether the latter knew the bill to be accepted for the drawer's accommodation or not. The principle of this doctrine, as applied to accommodation-bills, appears to be, that the holder is entitled to rely on the different obligants according to the several characters in which they sign the bill, and consequently to regard the acceptor as primary debtor (d). The same doctrine has since been confirmed. It was alluded to in a case (e), where one of two joint obligants in a note, maintaining that he was surety for the other, pleaded that he was released, because the plaintiff had given time to the other obligant, the Court being inclined to hold that the plaintiff was a principal, and could not be released even by giving time, though they decided

(a) *Laxton v. Peat*, 2 Camp. 186-7. In the subsequent case of *Collet v. Haigh*, 3 Camp. 281, Lord Ellenborough decided, that the holder of an accommodation-bill had not lost his recourse against the drawer by giving indulgence to the acceptor, holding that the drawer could not suffer here for want of notice, as he had no funds to withdraw from the acceptor. But it does not therefore follow that the holder, from knowing the bill to be accepted for the drawer's accommodation, loses that right which the structure of the bill gives him of treating the acceptor as primary debtor to him, whatever may be his relation and that of the drawer *inter se*.

(b) *Per Gibbs, J.*, in *Kerrison v. Cook*, 3 Camp. 362, and in *Ragget v. Azmore*, 4 Taunt. 730, *per Mansfield, C. J.*, who says, that, except in "the case cited in Campbell (*Laxton v. Peat*). it never was known that anything passing between other parties could discharge an acceptor." Lord Ellenborough himself appears to have acted on a different principle in *Mallet v. Thomson*, 5 Esp. 178, being an action by the indorsee against the maker of a

promissory-note, which, however, the plaintiff knew to have been made for the payee's accommodation. Yet Lord Ellenborough held, that an agreement by the plaintiff not to molest the payee, though, according to the principle of *Laxton v. Peat*, he was the principal party, did not discharge his claim against the maker, seeing the latter's claim of recourse against the payee was a matter distinct from this agreement, and not affected by it.

(c) *Fentum v. Pocock*, 1813, 1 Marsh. 14-17, 5 Taunt. 192. It appears that, in this case, the holder did not know, till after the term of payment, that the bill was accepted for the drawer's accommodation. But, even according to Marshall's report, the Court expressed the general opinion mentioned in the text; and according to Taunton's report, they decided the case expressly on that ground.

(d) *Vide* an opinion given by the Lord Chancellor in conformity with this doctrine in *Bank of Ireland v. Beresford*, 6 Dow's Appeal Cases, 237.

(e) *Price v. Edmonds*, 10 B. and Cr. 578.

that, under the circumstances, no time had been given. It has been also held (a), that the circumstance of the drawer of a bill, accepted for his accommodation, paying part of it to the indorsee, and giving him a new bill for the balance, but without getting up the former bill, did not discharge the other bill, or release the acceptor. There was here no giving of time on the old bill; but, although there had, and though the holder had known that the bill was an accommodation, this, according to the cases already noticed, would have made no difference.

‘The same rule has also been applied in Scotland. Thus, it has been held, that where there were two acceptors, one for value, and the other in accommodation, neglect to protest against the former did not release the latter (b); because, when a person binds himself as acceptor, that necessarily implies a consent that he is to be treated in every respect, in regard to the bill, as any other acceptor would be treated. It makes no difference that he alleges that the holder knows perfectly that he is only cautioner. Thus, where a person accepted a bill drawn by another for the other’s accommodation, he was not allowed to plead as a defence against payment that the holder had discharged the drawer (c); because nothing that the holder could do could make his claim of relief against the drawer either better or worse. All that the holder could discharge was his claim upon the bill, and on the bill the acceptor had no claim of any kind against the drawer.’

Law of Scotland.

When a person accepts bills for the accommodation of another, he ought to take a writing of some kind from the party accommodated, setting forth the fact, or a cross bill, that he may rank for the full sum on the other party’s estate, in case of his bankruptcy. In Scotland, the presumption from his acceptance that he has funds of the drawer to the amount of the bill, cannot be redargued unless by the drawer’s writ or oath. The accommodation being thus proved, the drawer will be bound to indemnify him, but not otherwise (d). The extent of claims under this obligation of indemnity

Accommodation acceptor should take an agreement to indemnify.

(a) *Rolfe v. Wyatt*, 5 C. and Pay. 181.

(b) *Lyon v. Butler*, 1841, 4 D. 178.

(c) *Lewis v. Anstruther*, 17 Dec. 1852, 15 D. 260.

(d) In England, the general obli-

gation of the party accommodated to indemnify the acceptor, was admitted in *Young v. Hockley*, 3 Wills. 346; the Court deciding also, in that case, that the obligation to indemnify did not arise till the acceptor had paid the bill,

shall be afterwards considered in the chapter on Action and Diligence. The acceptor will be also entitled to retain money belonging to the drawer, which has come lawfully into his hands, till the bill which he has accepted for the latter's accommodation be paid, or till he is secured against it (a). This rule has been held applicable, though the accommodation-bill had incurred the statute of limitations, when the principal debtor admitted that it was still outstanding (b). In Scotland, the sexennial prescription is held to extinguish the bill or note; and though the acknowledgment of the proper debtor, by writ or oath, might, notwithstanding, keep up the debt *against him*, it could not create a claim against an accommodation acceptor. It shall be afterwards explained under what circumstances such an acceptor's acknowledgment could be effectual against himself.

Accommodation acceptor's claim against accommodation indorser,

'In England, there are decisions to the effect, that if two or three parties join together to raise money for behoof of another by accommodation-bills, they are in questions of relief to be treated all alike, and not according to their respective positions on the bill. Thus, if one person draws and another indorses an accommodation-bill for behoof of an acceptor, and the drawer is forced to retire it, he has relief against the indorser for one-half, on the principle that the Court is entitled to look rather at the real transaction than at the form of the instrument (c). On the same principle, it would be held that, when one person accepted and another person, in the knowledge of the nature of the acceptance, indorsed a bill for behoof of the drawer, the indorser, on paying the bill, would have

and that, therefore, it did not fall under the certificate granted to the debtor on a commission of bankruptcy which was issued before the date of that payment. This last point was likewise decided in *Chilton v. Whiffin*, 3 Wills. 13; and in *Yallop v. Ebers*, 1 B. and Ad. 698.

(a) This principle was admitted by Lord Ellenborough in *Madden v. Kempster*, 1 Camp. 12, although the acceptors were refused the benefit of it, as they had obtained the money which they wished to retain from the

agent of the party accommodated, by a false statement, that he owed it to them as the balance of an account.

(b) In *Morse v. Williams*, 3 Camp. 418, Lord Ellenborough, in a question with the acceptors of an accommodation-bill, who wished to retain money till they were secured of their indemnity against it, held, that the party accommodated could not plead the statute of limitations, when he admitted the bill to be still outstanding.

(c) *Reynolds v. Wheeler*, 10 June 1861, 30 L. J. (C. P.) 320.

right only to one-half. In Scotland, it has been decided that the indorser in such a case is entitled to full relief (*a*). And the Scotch rule appears the sounder; because, if the parties had intended to make themselves jointly and not successively liable on the failure of the principal debtor, they could easily have framed their instrument so as to have attained that purpose.'

It has been decided (*b*), that, when one of four co-acceptors of a bill paid part of it (the fourth having become bankrupt), he was entitled to claim a third of the sum paid from each of the other two, but only a third, as they were both solvent, and that an averment that he was the party accommodated by their signatures could not be proved except by his writ or oath. A similar principle was adopted in another case, where one of several acceptors, having paid the drawer, after he had been ranked for a composition on the estate of another acceptor, was found entitled to sue that acceptor for the composition to the extent of his proportional relief, without regard to an allegation that another acceptor had got the contents of the bill (*c*).

(*a*) *Beveridge v. Liddel*, 14 Jan. 1852, 14 D. 328. See also *Robb v. Rhodes*, 21 Feb. 1811, H. 68.

(*b*) *Laing v. Anderson*, 27 June 1827, 5 S. 851.

(*c*) *Russell v. Douglas*, 10 Dec. 1830, 9 S. 163.

CHAPTER V.

OF PAYMENT.

IN the present view of our subject, it is assumed that bills or notes are to be paid, as it has been assumed that bills were to be accepted agreeably to their tenor, viz., as to acceptance, by the drawee of the bill, and in the case of payment by the acceptor of the bill or granter of the note, each of whom respectively is the proper debtor. There is another kind of payment, as well as acceptance, by a party who does not accept or pay in terms of the bill or note, but on the failure of the proper debtor, for his honour, or that of other parties. But this kind of acceptance or payment cannot be discussed till we consider the case of the parties designated by the bill or note failing to accept or pay, which shall be done under the head of Negotiation.

SECTION I.

PAYMENT—BY AND TO WHOM ?

By whom
payment may
be made.

A bill or note may be paid by any person liable for its amount, whether by the acceptor of the bill or granter of the note, as the proper debtor, or by any other parties, drawer or indorsers. But a drawer or indorser, before paying, must ascertain that the holder's recourse against him has been preserved by due negotiation of the bill or note, otherwise he will have no claim of indemnity for the sum paid against the previous parties (a). 'What he will have in that case will be—if he has paid without knowledge of the want of negotiation—a claim for the return of what he has paid

(a) *Roscow v. Hardy*, 1810, 12 East. 434 ; *Turner v. Leech*, 1821, 4 B. and Al. 451.

from the holder, through whose neglect recourse has been lost (a). On the other hand, if the bill have been duly negotiated, the indorser paying has his full rights of recourse against the previous parties. "When an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid; but when an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies, as he would have had, had he been called upon in due course, and had paid the amount to his immediate indorsee" (b). An indorser may, however, so manage the payment, as to lose his right of recourse against the drawer and the previous indorsers; as where he pays it solely on behalf of the acceptor, and takes a receipt from the holder exactly as if the acceptor had paid. Thus an indorser who went to a bank to retire a bill, and "in order to preserve the acceptor's credit" did so without saying from whom the money came, and allowed the acceptance to be deleted, it was held that he had paid for the acceptor and had discharged the drawer (c). Where an indorser is also agent for the acceptor, and it is doubtful in which character he has paid, the question is one for a jury to determine (d).

"Where an individual, out of his own funds, pays a bill to the holder, to which he is no party, and is put in right of the bill, he comes into the place of the holder to the effect of being entitled to claim against all the obligants to the bill, in the same manner as the holder could have done [e], although he may have been induced to interfere on account, or at the request of a party to the bill, who could either have only claimed against some of the obligants, or, as being the primary debtor, could not have claimed against any of them [f]. But, on the other hand, if the individual paying the bill

Payment by a stranger.

(a) *Milnes v. Duncan*, 1827, 6 B. and C. 671.

(b) *Per curiam*, in *Elsam v. Denny*, 12 June 1854, 23 L. J. (C. P.) 190. See also *Kidston v. Stead*, 21 Jan. 1809, F. C.

(c) *Martin v. Smith*, 8 Dec. 1854, 19 D. 143.

(d) *Pollard v. Ogden*, 30 May 1853, 22 L. J. (Q. B.) 439.

(e) *Adam v. Boyd*, 12 June 1830, 8 S. 914; *Muir v. Macdonald*, 4 Mar. 1831, 9 S. 535; *Graves v. Key*, 1832, 3 B. and Ad. 313.

(f) *Leslie v. Shepperd*, 22 Feb. 1833, 11 S. 436; *affd.* 30 May 1834, 7 W. and S. 457; 2 Bell's Comm. 523; *Napier v. Wilson*, 16 Nov. 1810, H. 65.

has done so expressly for the honour of a particular party, or if the circumstances show that he has paid, relying upon the credit and funds of a particular party, and with a view specially to the implement of that party's obligation as constituted by the bill [*a*], so as to identify him with that party, then it is apprehended that the individual so paying comes into the place of that party, with all the rights which would have been competent to him had he retired the bill, and not into the place and rights of the holder" (*b*).'

To whom
payment may
be made.

Payment, to be effectual, should be made to the proprietor of the bill or note, or a person authorized by him to receive it. Payment, therefore, to the original creditor will be unavailing after he has indorsed away the bill or note, whether the debtor has had notice of the indorsement or not (*c*). It has been said (*d*), that, if a bill is made payable to a certain party *only*, and is not negotiable, none but he, or a person holding power from him, can receive payment. In England, no bill or note is negotiable, unless made payable "to order." But such words are not necessary in Scotland; and, therefore, express words would be required there to restrain the negotiability of a bill or note. When a bill or note is made payable to A. "for the use of B.," A. alone has a right to exact payment (*e*).

Payment to an
executor.

If a party dies, payment cannot be safely made to his personal representative, unless he is likewise confirmed as executor. When the debtor does not deny the representative's right to receive payment, the usual course, in an action against him, is to give decree conditionally, "the pursuer confirming before it is extracted," so that it cannot be enforced till he confirms. It has been decided in England (*f*), that payment may be safely made to a person acting as administrator under the probate of a will, though the will itself turns out to be forged. The same rule would probably be held in Scotland regarding a payment to an executor confirmed under a forged will, as the confirmation is a sufficient warrant for payment (*g*).

(*a*) *Macdowal v. Ross*, 21 Feb. 1797, 4 Pat. Ap. 12; *Johnstone v. Robertson*, 2 Feb. 1830, 8 S. 430.

(*b*) *Per Wood*, and concurred in by majority of Court, in *Johnstone v. Inglis' Trustee*, 7 June 1843, 5 D. 1405.

(*c*) Pothier, No. 164; *Milnes v. Dawson*, 5 Dec. 1850, 20 L. J. (Ex.) 81.

(*d*) Marius, 141.

(*e*) *Evans v. Cramlington*, and *Smith v. Kendal*, *antea*, p. 52, note *e*.

(*f*) *Allen v. Dundas*, 3 T. R. 125.

(*g*) *Antea*, p. 145.

The effect of payments to a minor (a), or any party not entitled to act for himself, as well as the right of a husband to exact payment of all bills and notes payable to his wife (b), have been already explained. This right is, in general, subject to the same exceptions in favour of the wife (as *præposita negotiis* or otherwise), which have been already stated as to her power of granting obligations during the marriage (c). It has been said (d), that payments to a wife are in general ineffectual, when the debtor knows that she is married, and *vice versa* (e). But it would appear that his knowledge will be presumed, and that even ignorance will not excuse him, unless he show a reasonable ground for it, as that the marriage has been always kept secret, since every person ought to know the public *status* of any party with whom he deals. Although payment to a minor is unavailable to the acceptor against the minor, except in so far as the money paid has been profitably applied to his use, it has been stated (f), that such payment will be effectual against the drawer, as he must take the risk of having made his money payable to a minor. On the other hand, if the minor has received the money for the drawer's behoof, and has given him a counter-bill for it, it has been laid down (g), on the principles already stated, that he may be restored against this bill, except in so far as the proceeds of the other bill are proved to have been employed for his benefit.

Payment to a minor, or to a married woman.

Payment may be made to a factor or mandatary of the party *in titulo* of the bill or note (h), or to an individual partner of a company which has right to it (i); the same rules, however, being observed regarding such payments which have been already laid down regarding the powers of agents or individual partners (k). In a case (l), where the plaintiff belonged to two firms, consisting each of two partners, one in London and the other in Dublin (the other partner being different in each firm), and the Dublin house

Payment to a factor or mandatary, or to partners.

(a) *Antea*, p. 129 *et seq.*

(b) *Antea*, p. 136 *et seq.*

(c) *Ibid.*

(d) Chitty, 428.

(e) Erskine, iii. 5, 7.

(f) Pothier, No. 166.

(g) *Ibid.*

(h) The efficacy of such payment to

a factor is implied in *Favene v. Bennett*, 11 East. 540; the circumstances of which do not require to be detailed.

(i) *Duff v. East India Company*, 15 Ves. 213, *per Master of the Rolls*.

(k) *Antea*, p. 147 *et seq.*

(l) *Jacaud v. French*, 12 East. 317.

transmitted to the London house a bill drawn by the defendant, who afterwards deposited money with the Dublin house to pay it, but which money the other partner of that house misapplied without the plaintiff's knowledge, the latter was, notwithstanding, held to be bound by his partner's act, and was therefore prevented from suing the defendants, in right of the London house, with the other partner of that house, for payment of the bill.

Payment to
other parties.

It has been said that, when the payee of a bill acts merely as factor for another party, though his character of factor, as is implied, does not appear *ex facie* of the bill, the principle may countermand payment (a). But Beawes (b) reprobates this doctrine, as overturning the validity of all acceptances; and, unless the payee's character of agent appears *ex facie* of the bill, there seems to be no reason why the acceptor's obligation, which is to pay to him absolutely, should be revocable by a third party. It has been held in England, that a check on a banker is revoked by the granter's death, so that payment of it by the banker will not be good, unless it is made before he hears of the drawer's death (c). It seems to be considered as a kind of mandate. In Scotland, such a check, being an assignment of the funds in the banker's hands, might be completed by presentment to him even after the drawer's death. It has been found (d), that payment to a country attorney, who had been employed by the creditor's town attorney merely to arrest in case of refusal to make payment, was not effectual, and that the debtor must pay again. The production of a bill or note 'indorsed in blank by the proper person (e)' will, in general, be a sufficient warrant for paying it to the holder as agent of the creditor (f), though there should be no evidence that he is the creditor's ordinary agent (g). The possession of the document is *prima facie* evidence of his authority, though that may be disproved by establishing that he came by it otherwise (h).

(a) Marius, 72-3. (b) No. 215.

(c) *Tait v. Hilbert*, 2 Ves. 121, referred to in 16 Ves. 450.

(d) *Yates v. Frecklington*, 2 Dougl. 662.

(e) Chitty, 271; Story, § 415.

(f) This circumstance was left to the jury as evidence of agency, and

held sufficient to prove it, to the effect of charging the principal with receiving a usurious payment, in *Owen v. Barrow*, 1 Bos. and Pull. N. R. 101.

(g) Paley, Law of Principal and Agent, 276.

(h) *Per Holt*, C. J., Anon. 12 Mod. 564.

The rules as to payment of a bill or note which has been lost or stolen to the actual holder, in the two cases of its being indorsed blank or in full, have been already stated (*a*). The general result appears to be, that when there is a full indorsement, the debtor cannot safely pay to the holder, unless he knows that he is indorsee, or holds a mandate from him to receive payment; but that, when the indorsement is blank, or the instrument is payable to the bearer, any holder is entitled to payment, unless there is reason to believe that he has come unfairly by the bill or note. As to the first of these propositions, it has been doubted whether the debtor would not be excused if he should pay the bill or note *bona fide* to a person who had taken it by robbery from the actual indorsee, and demanded payment by personating him. But the indorsement, by being special, designates a certain person as entitled alone to receive payment, and therefore notifies to the debtor that he will not be safe unless he ascertains that it is this person who gets payment (*b*).

Payment of a
lost or stolen
bill.

This principle seems equally applicable, in whatever way the holder of the instrument has got possession of it, whether by his own unlawful act, or by accident, or by the negligence of the true creditor. It is also applicable where the holder endeavours to get payment by an indorsement forged in name of the true creditor in his favour; for this is, in fact, no indorsement, and, however dexterously it may be executed, the debtor is no more justified in paying on the faith of it, than he would be entitled to take credit against a person who had funds in his hands for paying a draft forged in his name (*c*). The same doctrine applies to payments made to a person claiming on a forged commission of factory, though the contrary is said to have been once decided (*d*). In all these cases, proper care would have detected the forgery; and the debtor must take the risk of paying without exerting such care (*e*).

Payment on a
forged indorse-
ment.

The efficacy of payments to bankrupts, or those in the manage-

(*a*) *Antea*, p. 206 *et seq.*

(*b*) Pothier, No. 168.

(*c*) In *Borland v. Thistle Bank of Glasgow*, Feb. 1768, Morr. 877, it was found that a bank was not bound to pay value for notes forged in their name, and that, when a forged note is

presented, they are entitled to stop its currency, by putting a doquet on it, certifying that it is a forgery. *Antea*, p. 175.

(*d*) Forbes, 117-18.

(*e*) *Vide* Forbes, 118.

ment of their estates, shall be afterwards discussed, in the chapter on Bankruptcy.

SECTION II.

TIME OF PAYMENT.

Time of pay-
ment.

A bill or note transferable by delivery cannot be safely paid to the bearer before it becomes due. It has been held, that a banker who paid a check which had been lost, the day before it fell due, to a party who presented it (though he had no notice of the loss), was bound to pay it again to the loser (*a*), such a payment being held not to be in the ordinary course of business. 'And if a note be paid before it becomes due, and it be re-issued, even fraudulently, it is held that a person taking it before maturity, for value, and without notice, is entitled to make the granter again pay it (*b*). As a matter of course, the holder can no more be compelled to receive payment of the bill before it is due, than he can be compelled to give time afterwards (*c*).'

The same observation applies to such premature payment, when made to a person holding a mandate from the creditor, because the mandate may be recalled before the term of payment (*d*). There does not, however, appear to be risk in paying, even before the term of payment, to a person specially named as payee or indorsee, whether he holds the bill or note on his own account, or as mandatory for another, if his right *ex facie* of it is unqualified (*e*). The contrary doctrine, which has been laid down by some authors (*f*), proceeds on the exploded notion that the payee's right is only a mandate, which the drawer may recall before the term of payment. But if the debtor, from the prospect of some benefit by the rate of exchange or otherwise, should offer payment before the term

(*a*) *Da Silva v. Fuller*, Sel. Ca. 238; Chitty, 272.

(*b*) *Burbridge v. Manners*, 1812, 3 Camp. 194.

(*c*) Chitty, 274; 2 Pardess. No. 401. As to the acceptor's power of discount-

ing his own bill before maturity, see *antea*, p. 178.

(*d*) Story, § 417.

(*e*) Forbes, 109; Dupuys de la Serra, 12, 7.

(*f*) Molloy, B. 2, c. 10, § 32, and Malynes, C. 6, Obs. 10.

arrives, the creditor is not bound to take it, since the term of payment is a condition of the bill or note, fixed equally for behoof of both parties (*a*).

If the creditor has funds of the debtor in his hands, he cannot retain them in security of a bill or note till it falls due, unless the debtor becomes insolvent (*b*). But his right of retention is complete at the term of payment; and if he has money of the debtor in his hands, he may immediately apply it in payment. In an English case (*c*), it was decided that a banker might apply a customer's money in his hands to the extinction of a bill accepted by the customer, which the banker had acquired by discounting it, though the customer died on the day that it fell due, the bill having been written off in the banker's books as paid, an hour before he heard of the customer's death. In Scotland, the law would have warranted him to pay the one debt by the other, without any operation in his books. But, in the same case, it was decided that the banker could not set off any part of the sum due to his customer against a note granted by him which the banker had discounted, and of which the term of payment was not arrived, seeing he had given credit for it till then. This was held to exclude the application of the English statute of set-off, and it would have excluded compensation in Scotland.

Holder's right to retain acceptor's funds till that time.

By the law of Scotland, as well as of England, bills or notes are not payable till the third day after the term of payment. These three days are called days of grace. It is said by one author (*d*), that the debtor may insist on the creditor taking payment when the bill or note falls due, though the days of grace have not expired, they being merely an indulgence to him. This rule has not been followed by us. At all events, the bill or note must be paid on the last day of grace; and, if it should fall on a Sunday, or a day when, by public authority (*e*), no business can be done, payment must be made on the preceding day (*f*). Days of grace are allowed on all bills or notes payable at a definite term, whether after date or after sight. No days of grace are allowed on bills or notes

Days of grace.

When allowed.

(*a*) Forbes, 108.

(*b*) *Vide* 2 Bell, 96.

(*c*) *Rogerson v. Lashbrooke*, 7 Moore, 412.

(*d*) Dupuys de la Serra, c. 12, § 9.

(*e*) Forbes, 104.

(*f*) This was decided in *Smith v. Laing*, 29 June 1786, M. 1612.

payable on demand. The same rule has been laid down by some authors with regard to bills or notes payable at sight (*a*). But it was taken for granted in an early English case (*b*), that days of grace were to be allowed on such bills. The same thing was also assumed in another case (*c*), where it was doubted whether they were allowed on a bill payable a certain time *after* sight. Again, in a case (*d*), where the question was, whether a bill payable at sight was included under an exception in the Stamp Act, 23 Geo. III. c. 49, § 4, in favour of bills payable *on demand*, the Court decided that it was not; and Buller, J., mentioned a case tried before Willes, C. J., in London, in which a jury of merchants were of opinion that days of grace are allowed on bills payable at sight. In Amsterdam, days of grace are allowed on such bills (*e*). There has been no decision on this subject in Scotland.

Payment must be made on the last of these days.

By the law of Scotland, payment, whether of a foreign or an inland bill (for they are both on the same footing in this respect), must be made at any hour of the last day of grace when it is demanded (*f*). In England, this rule has been long established with regard to foreign bills; it being laid down that the holder is entitled and bound to protest on the last day of grace, if payment is not made on that day when demanded (*g*), or at least is not offered in such time that the holder may, in case of non-payment, take a protest that day. In inland bills, it was once held that the debtor had all the last day of grace to pay them (*h*). But this rule was

(*a*) Forbes, 107; Pothier, 172; Jousse de l'Ordonnance, 1673, 68; Beawes, No. 256; Kyd, 10.

(*b*) *Dehers v. Harriot*, 1 Show. 163.

(*c*) *Coleman v. Sayer*, 1 Barnardist. 303.

(*d*) *J'Anson v. Thomas*, 1784, 3 Doug. 421. Bayley also expresses his opinion (244-5), that days of grace are allowed on bills payable after sight. Story (§ 342) and Chitty (p. 261) are of the same opinion. *Vide* likewise Selwyn's N. P. 353, 5th edition.

(*e*) Forbes, 107.

(*f*) In *Cruickshanks v. Mitchell*, 29 June 1748, M. 1576, being the case of a bill drawn in Scotland on London, the Court decided that the protest,

then necessary for preserving recourse, was for that purpose null, when taken the day after expiration of the days of grace. In *Tod v. Maxwell*, 12 July 1758, M. 1583, a bill on London was similarly found not to be properly negotiated by protesting it the day after expiration of the days of grace. Although these are instances of foreign bills, no distinction appears to be recognised on this point betwixt them and inland bills.

(*g*) The law is laid down almost in those terms, in *Tassel v. Lee*, 1 Lord Raym. 743. See farther, as to this, under "Time for presentment for payment," Chap. VI. Sect. I.

(*h*) *Per* Buller, J., in *Colkett v. Free-*

afterwards disputed (a); and it seems to have been at last settled, as held in Scotland, that, if the debtor refuses payment at any time on the last day of grace, the bill may be immediately protested (b).

The mode of computing the term of payment, whether with reference to the time mentioned in the bill or note, or the number of additional days allowed as days of grace, varies in different countries. When a bill or note, drawn in one country and payable in another, is payable a certain time *after date*, the computation of the term of payment is understood to depend on the style or mode of calculating time that prevails in the place where it is drawn (c). For the term of payment, in that case, bears reference to *the date*, which must depend on the style of the country where the bill was dated. In all other cases, the term of payment must be computed according to the style of the country where the bill is payable, as, in all particulars of the contract, parties are understood (unless the contrary is expressed) to have in view the law of the country where it is to be performed (d). In bills payable after date, the date must be reduced or carried forward from the style of the place where the bill was drawn, to that of the place where it is payable; and the term of payment calculated from the date thus carried forward (e). When a bill or note is payable a certain time (whether expressed in days, months, or usances) after date or after sight, this period is computed exclusive of its date or day of presentment (f).

The days of grace are regulated by the custom of the country where the bill or note is payable. In England and Scotland, as in most countries of Europe, they are exclusive of the day on which it falls due (g). But in Hamburgh, where the days of grace are

How term of
payment
computed.

How days of
grace com-
puted.

man, 2 T. R. 61. The same opinion was laid down by Lord Kenyon, C. J., in *Leffley v. Mills*, 4 T. R. 174.

(a) *Per* Lord Alvanley in *Haynes v. Birks*, 3 Bos. and Pull. 599.

(b) This doctrine was laid down by Lord Ellenborough in *Burbridge v. Manners*, 3 Camp. 194, and afterwards assented to by the Lord Chancellor in *Moline ex parte*, 19 Ves. 216. The same rule seems to be implied in *Hume v. Peploe*, 8 East. 168-9. See Chitty, 274.

(c) Marius, 89, 90; Bayley, 249.

(d) Marius, 100-1.

(e) *Ibid.* 89; Bayley, 249.

(f) This was decided, as to a bill payable after date, in *Hague v. French*, 3 Bos. and Pull. 173. As to bills payable after sight, it was held by Treby, C. J., in *Bellasis v. Hester*, 1 Lord Raym. 280, and was taken for granted in *Campbell v. French*, 6 T. R. 212.

(g) Forbes, 104.

eleven, it is said to have been decided (*a*), that the holder need not present for payment till the eleventh day, if it is a post-day; although, if it is not, he must present the immediately preceding post-day. If the drawee resides, not at Hamburgh, but at Bremen, or some place in daily intercourse with it, it is enough to present the bill or note on the eleventh day, though not a post-day (*b*).

Usances.

A bill or note drawn between two countries is sometimes also made payable at usance; which is the period usually allowed for the payment of bills or notes between two countries. Usance varies from fourteen days, to one, two, or three months after the date of the bill. Double or treble usance is twice or three times the usual time, and half usance is half that time. The days of grace are added after expiration of usance specified in the bill.

A table is subjoined in the Appendix, of the number of days of grace allowed in different countries of Europe, as well as the length of the usances established betwixt different countries.

How months
are computed.

When the term that it has to run is expressed in months, calendar months, and not lunar months, are understood (*c*). Though one of these months should be longer than the succeeding month, the term of payment, if a month, is never carried into the third month. For instance, whether a bill or note be dated on 28th, 29th, 30th, or 31st January, if it is made payable a month after date, it will become due on 28th February, or, in leap year, on the 29th (*d*). It has been laid down by Marius (*e*), that when a bill or note is payable in a month and a half, or half a month, the half month must be held to consist only of fifteen days. But a modern French author (*f*) holds that it should be sixteen days, thus giving the debtor the benefit of the 31st day.

(*a*) *Goldsmith v. Shee*; vide Bayley, 246.

(*b*) *Goldsmith v. Bland*, Bayley, 246.

(*c*) Beawes, No. 253.

(*d*) Kyd, 6; Beawes, No. 253-5; Marius, 74; Forbes, 104-5; Chitty, 257. In *Jarron v. Smith*, 17 June 1803, M. App. to Bill, 18, where a bill was dated on 30th April, and payable three months after date, it is said to have been held "that, by the practice of merchants, the 2d August was the

last day of grace," not the 3d, which it would have been according to the rule stated in the text. But this was not decided, and the foregoing authorities seem to prove that the contrary is the practice of merchants. The point, however, does not seem to be quite clear; for, in Robertson's *Handy Book of Banker's Law*, p. 36, and Menzies on *Conveyancing*, 3d ed., p. 365, the rule is stated as in *Jarron v. Smith*.

(*e*) 93. (*f*) Pardessus, No. 251.

If the creditor in a bill or note will not take payment when it is due, the debtor should tender it to him by form of instrument (a). It is said to have been decided, that such a tender, even without consignation, will free him from interest (b). But consignation in some responsible bank seems to be the only mode of freeing him from future claim. It would appear sufficient if made by instrument; but he will be freed from all challenge if it is made by warrant of a judge (c). Consignation will not be sufficient without a previous tender (d). Nor will consignation in Scotland be sufficient on a debt payable in London, unless the amount of exchange is also consigned (e). The creditor is not bound to accept an offer of payment from the debtor or any third party after the bill and protest have been sent away, or, even though they should not, after he has re-drawn for the value (f). Indeed, it would appear that he is not bound to accept such an offer, even when made on the last day of grace, after payment has been refused and the bill protested, unless the expense of the protest is also offered (g). A tender of payment by the drawer or indorsers of a bill or note is sufficient, when made as soon as they have got notice of non-payment (h).

What if the creditor refuses to take payment?

(a) Forbes, 112.

(b) *Boick v. Blackwood*, 12 July 1703, cited by Forbes, 102-3.

(c) This is the mode suggested by Forbes, 112.

(d) *Earl of Queensberry v. Duke of Buccleuch*, 9 July 1675, cited by Forbes, 112.

(e) In *Temple v. Wallace*, 18 Feb. 1701, also cited by Forbes, 112, a person who had suspended a charge on a debt of this kind upon consignation, was ordained to uplift the consigned money, and pay it at London, where the debt was payable, as he had not consigned the amount of the exchange.

(f) Forbes, 113.

(g) In the English case of *Leftley v. Mills*, 4 T. R. 170, where payment of a bill was offered on the last day of grace, after it had been refused on the same day, and a protest taken, the creditor was found not entitled to the expense of the protest. But this deci-

sion proceeded on the terms of the English Act 9 & 10 Will. III. cap. 17, which were held not to authorize a protest on inland bills till after the last day of grace.

(h) This was decided in *Walker v. Barnes*, 5 Taunt. 240, by the Court of Common Pleas, in a question with the drawer; it being held that he was not bound to pay till within a reasonable time after he had got notice (in this case he tendered payment the day after), as he could not know till then who was the holder of the bill. But the true doctrine appears to be, that the drawer and indorsers ought to be always ready to make payment at any time after the bill or note has fallen due, and will therefore be liable immediately upon receiving notice. Bayley, 350, and *Siggars v. Lewis*, 2 Dowl. P. C. 1, Cr. M. and R. 370; 4 Tyrwh. 847; S. C. *post*, under the head of Notice.

SECTION IV.

MODE OF PAYMENT.

Payment in
coin.

It has been explained that bills or notes must be paid absolutely, and that they cannot contain an obligation, either to make payment, or to do some other act. It has been likewise shown that the payment of bills or notes must be stipulated and made in money, not in other commodities. They must also be paid in the coin stipulated, or, if no coin is mentioned, in that which is the legal money in the place of payment.

The creditor
takes the gain
or loss by a
change of
currency.

It is a question, viz., whether the debtor or creditor is to bear the depreciation, or reap the benefit of any rise during the currency of the obligation, in the coin in which payment is stipulated? Forbes (*a*) decides that, in that event, the creditor must bear the loss or take the benefit, unless he has specified the value of the coin, in which case, he says, the number of pieces will be greater or smaller as their value has been diminished or enhanced. Even this stipulation, he seems to hold, would only be applicable to alterations of value made by custom, and not to those made by public authority, which must decide, in all cases, the denomination of the coin; so that the creditor must suffer the risk of any change made by authority before the term of payment, though he is not bound to take payment in coin just about to be cried down (*b*). According to this doctrine, the creditor must take payment in the stipulated coin, according to its value at the time of payment, without regard to any change made in it after the date of the bill or note, by the law of the country where payment is to be made, the parties being understood to have in view the state of things where the contract is to be performed, at the time of performance. Yet it was found, in an English case (*c*), that a bill drawn in London on a merchant in Portugal, payable in milrees, must be paid according to the value of that coin when the bill was drawn (as there had been a depreciation before it was presented); because, though an alteration in English coin, by public authority, might affect the contracts of

(*a*) 101-2.
(*b*) 103.

(*c*) *Da Costa v. Cole*, Skin. 272,
per Holt, C. J.

English subjects, no such alteration made by a foreign government could have this effect. It might have been answered that the parties, in making the contract, had a view to the law of the country where it was to be performed. But although a note payable at Paris, or, at the bearer's option, in London, according to the course of exchange on Paris, should be drawn when there is a direct course betwixt London and Paris, and this should be interrupted before the term of payment, the granters will be liable according to the circuitous course of exchange which exists *at that date* (a). This decision seems to recognise the doctrine, that parties must be held to contemplate the state of things at the term of payment (b).

The effect of payment by a remittance of bills by post, although they should be lost, has been already discussed (c). 'As already shown, payment by bill is only a conditional payment; and if the new bill, on being properly negotiated, is not retired when due, the holder may sue on the old bill (d). Where a receipt is given for payment of a debt "by bill," but it is admitted that no bill was actually granted, the creditor may sue for the original debt without reducing the receipt (e). In the same way, where a bill is marked as paid by renewal, but retained by the holder, the holder may sue the acceptor of it, if the renewal bill be not paid. In certain circumstances, there may be parole proof that one bill has been granted in payment of another. Such proof was allowed in a case where the sums in the two bills agreed, and where the second was drawn on the day on which the first was due (f). A creditor taking another bill in payment of his bill, would discharge the drawer and indorsers of the first by thus agreeing to give time to the acceptor,

Payment by
bills.

(a) *Pollard v. Herries*, 3 Bos. and Pull. 335.

(b) The authorities do not seem to be agreed as to who takes the risk of a change in the value of currency. In the last edition of Chitty (p. 275), the law is stated to be, that the drawer takes it if both he and the acceptor are in this country, and that the acceptor takes it if he lives abroad. Story (§ 418) thinks the drawer takes the risk in all cases. The opinion of Forbes, quoted in the text, seems the more reasonable; for a contract to pay a

certain sum of money is just a contract to deliver a certain number of articles, and is fulfilled as soon, and not before, that number is told out, whatever its intrinsic value may be.

(c) *Antea*, p. 208.

(d) *Antea*, p. 94; and see also *Dundas v. Morison*, 4 Dec. 1857, 20 D. 225; *Sayer v. Wagstaff*, 22 Mar. 1844, 13 L. J. (Ch.) 161.

(e) *Thomson v. Thomson*, 1 Dec. 1829, 8 S. 156.

(f) *Dougal v. Hamilton*, 17 July 1863, 1 M'Ph. 1142.

unless he had their written consent to the arrangement (a).’ In the case of an agent receiving payment for his principal, and remitting the money by bills from third parties, it has been decided (b), that a steward in the country, who sends rents to his master in London by taking bills from persons who are reputed of credit and substance, will not be responsible though the bills are dishonoured and the money lost; and the same doctrine is held if a trustee or agent lodges money belonging to his constituent with a banker, then in good credit, who fails (c). But it has been also decided, that if he deposits his constituent’s money with his banker as his own, and not in his constituent’s name, so that he might have drawn it out on his own account, he must suffer the loss if the banker fails (d).

Payment by
check.

Marius advises the holder of a bill, when a draft on a banker is given him in payment, not to give the bill up till the draft is paid (e). In one case, however, where the plaintiffs, holders of a bill, had sent to their correspondents in London to recover payment, and the latter gave it up to the acceptors on getting a check from them for the amount, which was dishonoured, the plaintiffs were non-suited in an action against their correspondents for negligence, as they had acted only according to the usual course of trade (f). But, where a bill had been given up to the acceptors, on the latter giving the holder a check in payment, which was dishonoured, it was decided that the holder could not recover against the drawer and indorser without producing the bill (g). The acceptor granting a check in payment will be discharged, if the holder takes payment from the banker on whom it is drawn in his own notes, though the banker should fail; as the holder thus gives a new credit to the bankers, with which the drawer of the check has no concern (h). The

(a) *Postea*, Chap. VI. Sec. 5.

(b) *Knight v. Plymouth*, 3 Atk. 480. *Vide* on the same subject, Pothier, No. 85.

(c) *Rowth v. Howell*, 3 Ves. 566, *per* the Lord Chancellor; *Adams v. Claxton*, 6 Vesey, 226 and 231, *per* Master of the Rolls.

(d) *Wren v. Kirton*, 11 Ves. 381, *per* the Lord Chancellor.

(e) 21-5.

(f) *Russell v. Hankey*, 6 T. R. 12. *Vide* also to the same effect *Rid-*

ley v. Blackett, Peake’s Add. Cases, 62.

(g) *Per* Lord Ellenborough, in *Powell v. Roche*, 1807, 6 Esp. 76; Ch. 276, n. 7. In this case, the holder had given notice of non-payment to the indorsers as soon as the check was dishonoured. Whether this was due notice, shall be afterwards considered. But the defendants had besides waived the question of notice, by promising to pay the bill if it was produced.

(h) *Vernon v. Bourverie*, 2 Show. 296.

mere production of a check drawn by the debtor in the creditor's favour, and indorsed by the latter, has been held to be *prima facie* evidence of the contents being applied to the debt in question (a), if it is not alleged that there were other transactions between them (b), although, without the creditor's indorsement, the check, even when drawn in his name, will not be evidence that he got the money (c).

The creditors of a bankrupt, by taking bills from him for a composition on their claim, and giving him a full discharge of the debt, are precluded, even on his failure to pay the bills, from claiming afterwards, under a sequestration against him, for more than the amount of the composition (d). 'But if no full and absolute discharge be given, an agreement to take a composition in place of a debt operates only as a conditional discharge, to be disregarded if the composition be not punctually paid (e). An agreement to accept a composition on a bill does not prevent the creditor from doing diligence: it leaves it for the debtor to prove the agreement, and compliance with it, by way of exception. If the debtor fail satisfactorily to establish the agreement, *i.e.*, fail to establish it completely by the writ or oath of the holder, the diligence will proceed (f). If he satisfactorily prove the agreement, the diligence will not be altogether suspended,—unless composition bills have been granted,—but will be found orderly proceeded to the extent of the composition (g).'

Payment by
composition.

In this case the holder of the check (or of notes on his debtor's banker) might have had cash, but rather chose notes from the banker, payable to a party to whom he owed money. He had given his debtor a receipt on getting the check, but this circumstance does not appear to have been relied on.

(a) *Egg v. Barnet*, 1800, 3 Esp. 196, *per* Lord Kenyon.

(b) In *Aubert v. Walsh*, 1812, 4 Taunt. 293, where a number of checks drawn by the defendants, and paid to the plaintiffs, was produced by the former as evidence of set-off against the latter's claim (there having been various transactions between the parties), the Court of C. P. refused to

admit such evidence, as it was not proved for what consideration the checks had been given. This decision is not inconsistent with that in *Egg v. Barnet*, note (a), where it was not alleged that there could be any other consideration than the debt in question.

(c) *Egg v. Barnet*, note (a). As to payment by bills and checks, see further, *antea*, pp. 93, 94 *et seq.*

(d) *Graham v. Cuthbertson*, 9 Dec. 1828, 7 S. 152; 2 Bell's Comm. 506.

(e) *Woods v. Ainslie*, 9 Feb. 1860, 22 D. 723; 2 Bell's Comm. 472.

(f) *Callon v. Shanks*, 15 Nov. 1851, 14 D. 41.

(g) *Dick v. Murison*, 13 Nov. 1845, 8 D. 1.

Implied
payment.

It has been held in England, that a legacy by the drawer of a bill to the payee for a larger sum than the amount of the bill does not extinguish it, though the bill should happen to be in the payee's hands at the testator's death, as the testator had reason to believe, from the negotiable nature of bills, that it might have passed, before his death, to a third party (a). But a paper in the creditor's hand, dated after his will, and bearing that his debtor in a note was to pay no interest, "nor shall I ever take the principal unless greatly distressed" (it being proved that the creditor died in affluence), was found, in a question with his executors, to discharge the debt (b).

Indefinite
payments :
How to be
attributed.

When the proper debtor in a bill or note owes several debts to the holder, and makes an indefinite payment, it is a question how far this payment must be applied to the bill or note, or to the other debts due to the holder.

Roman law.

The general rule of the civil law, in the case of indefinite payments, was, that if the debtor did not appropriate them, the creditor was entitled to do so at the time of payment, but not *ex post facto* (c), so as to meet the state of claims between them and the debtor as at an after period. Failing such appropriation, the indefinite payment was first imputed to the debt most severe on the debtor, or, otherwise, to that which had been longest due. It was likewise imputed first to interest before principal sums (d), 'to debts past due before debts to become due (e), to penal bonds before bonds with no penalty, and to principal rather than to cautionary obligations (f). If these rules failed to point out the debt, the payment was attributed to the oldest (g); and if all the debts were alike old, then to each *pro rata* (h).'

English law.

In England, when the person making an indefinite payment owes several debts to the payee, the latter may select the debt to which it shall be applied (i), without being confined to the date of the payment, or, where one debt is secured by sureties and another not, being obliged to consult the interest of the sureties, by appro-

(a) *Carr v. Eastbrook*, 3 Ves. 561.

(b) *Aston v. Pye*, cited in *Eden v. Smith*, 5 Vesey, 350, note.

(c) Dig. 46, 3, 1.

(d) *Ibid.* 46, 3, 5.

(e) D. 46, 3, 3; 46, 3, 103.

(f) D. 46, 3, 4-5.

(g) D. 43, 3, 5.

(h) D. 46, 3, 8; Puchta, *Pandekten Recht*, § 287.

(i) *Manning v. Westerne*, 2 Vern. 606.

priating any part of the payment to their debt (a). 'Thus, if the creditor hold two bills, one stamped and the other unstamped, he is at liberty to impute an indefinite payment to the latter (b).' There seems to be only one exception to this doctrine; viz., that where one debt might create rigorous penal consequences against the debtor, as where he might be rendered bankrupt on it, and another debt could have no such effect, an indefinite payment must be imputed to the former debt (c). 'It is perhaps also to be considered as an exception—for it does not seem entirely consistent with the general rule—when it is held that if there be two promissory-notes, one barred by the statute of limitations and another not, an indefinite payment is to be attributed to the latter (d).

'In current accounts, or in separate accounts treated by consent as one current account (as is the case with accounts with bankers), the rule in England is, that indefinite payments are to be treated as applicable to the earlier items (e). And when a bill is lodged with a banker as a temporary accommodation, indefinite payments are attributed to it, and the parties to the bill, other than the customer, are liable only for the balance which these leave, though the customer may afterwards have been trusted with further advances (f). But where the bill is lodged as a continuing security for advances, it is not extinguished by the fact of a balance having at one time after its maturity existed in favour of the customer (g).'

In Scotland, the same rule exists as in England in favour of the debtor, as to debts inferring a high penal certification against him; for instance, when an adjudication has been led against him on one debt, and not on another. But, when no such penalty attaches to any one debt, an indefinite payment will, with a view to the creditor's

(a) *Goddard v. Cox*, 1742, 2 Str. 1194; *Bosanquet v. Wray*, 1815, 6 Taunt. 597; *Kirby v. The Duke of Marlborough*, 1819, 2 M. and S. 18; *Plomer v. Long*, 1816, 1 Stark. 153.

(b) *Biggs v. Wright*, 1 M. and Ry. 308.

(c) *Megget v. Mills*, 1695, 1 Raym. 285, per Holt, C. J., and *Bowe v. Holdsworth*, Peake, N. P. C. 64; in both of which cases the effect of imputing the payment to the debt selected by the

creditor would have been to render the debtor bankrupt on another debt.

(d) *Nash v. Hodgson*, 8 Nov. 1855, 25 L. J. (Ch.) 186.

(e) *Devaynes v. Noble* (Clayton's case), 1 Meriv. 572; *Bodenham v. Purchas*, 1819, 2 B. and Ald. 39; *Pemberton v. Oke*, 1827, 4 Rus. 154.

(f) *Hammersley v. Knowlys*, 2 Esp. R. 665.

(g) *Pease v. Hirat*, 10 B. and C. 122.

interest, be applied to the debt least secured; for instance, to one resting on a personal obligation, in preference to one heritably secured, or to one which will otherwise be prescribed, or to a debt which does not carry interest, in preference to one which does, or generally to such debt as the creditor chooses (a). 'Thus, if a bill be granted in security of a debt, the holder may apply indefinite payments to expenses incurred on the bill before applying them to the debt secured by it (b).' We follow the civil law, however, in applying such payments to interest, before principal sums (c). Further, when there are sureties with the debtor for one debt, and none for another, it has been decided that the creditor is bound to apply an indefinite payment to the two debts, in proportion to their respective amounts, so as to give a proportional relief to the sureties (d). A contrary doctrine, indeed, seems to have been followed in one or two recent cases (e). But it may be doubted whether these cases, in which the point does not appear to have been discussed, are sufficient to alter the rule already noticed.

Application to
bills and notes,

As to bills or notes, a learned author observes, that the holder, when he has a balance in his hands belonging to the acceptor, without other claims to set off against it, is bound to deduct it from the bill before claiming on it against the drawer or indorsers; and he cites a case where this plea would have been sustained at the instance of the indorsers against the holders of a bill, if the fact of the latter having a balance belonging to the acceptors had been proved (f). But he states, that when the holder has any other claim against the acceptor, he is entitled to set off the latter's money in his hands entirely against it. This doctrine does not, at first sight, seem compatible with that already mentioned, viz., that

(a) *M'Leod v. M'Kenzie*, 26 Jan. 1821, 1 S. 86; *Dickie v. Carnie*, 21 Nov. 1834, 13 S. 71.

(b) *Wright v. M'Farlane*, 16 Nov. 1837, 16 S. 67.

(c) *Ersk.* iii. 4, 2.

(d) *Ibid.* *Duchess of Buccleugh v. Doul*, Feb. 1725, *Morr.* 6807.

(e) *Cochrane and Co. v. Mathie*, 22 June 1821, 1 Shaw, 80; *Bannatyne's Representatives v. Brown's Trustees*, 26 Feb. 1825, 3 S. and D. 593.

(f) 1 Bell, 423, note 1, *Calder and Co. v. The Leith Bank*, 30 May 1816. In this case, as reported by Mr Bell, the Court, by the narrowest majority, refused a suspension by the indorsers of a charge given them by the holders, solely because the fact of there being a balance in their hands belonging to the acceptors was not completely verified. Had it been verified, the result would have been opposite.

when a third party is bound along with the debtor as surety for one claim, and there is no surety for another, the creditor receiving an indefinite payment must impute it proportionally to both claims. But as all the obligants on a bill or note, whether they have signed for the accommodation of other parties or not, are liable to the holder directly as principals, their mutual obligations as principals or sureties seem to be merely relations *inter se*, which cannot have effect against the holder, regarding the application of indefinite payments made to him, or for any other purpose. A decision to this effect has been given in an English case (a), where it has been held, that the creditor in a bill was entitled to set off the balance due by him to the acceptor against a separate debt which the latter owed to him; the Court proceeding on the doctrine, that the creditor was entitled to impute a payment by his debtor to what debt he chose. Nor can the acceptors of a bill plead against the holder any private arrangement between them and the other parties as a reason for staying summary diligence against them, till the amount of the drawer's or indorser's funds in the holder's hands has been ascertained. It was therefore decided, that acceptors could not, on the averment that they were accommodation-acceptors, suspend diligence of the holders, till the latter assigned to them a mortgage which they had from the other parties, although the assignation was asked only under reservation of a preference over it to the holders for all their other claims; the Court being of opinion that, as the suspenders were primary debtors *ex facie* of the bill, no claim founded on a contrary assumption could be allowed to stay diligence, though it might be discussed in an ordinary action (b).

When a person has only one general account with a banker, the rule laid down in England seems just, that his payments, advances, or receipts, shall be set off against the opposite articles in the earliest part of the account, since both parties must have understood that the articles on opposite sides were to be set off against each other according to their dates, so as to carry down a balance from beginning to end of the account, and not the contrary way (c).

and accounts-current.

(a) *Crosse v. Smith*, 1 M. and S.

(c) *Per Master of the Rolls in*

(b) *Cowan v. Hurry*, 19 Dec. 1816, F. C.

Deraynes v. Noble (Clayton's cases), 1 Merivale, 608.

‘The rule has accordingly been recognised in Scotland (a), and in a recent case our law is thus summed up by Lord Mackenzie:—“The general rule of law to be collected from the decisions appears to be, that when a debtor pays money without specifying, at the time of payment, on what account it is paid, it is in the power of the creditor to apply it to whatever account he pleases; but if there is no appropriation by either party, and there is a current account between them, which is communicated to the debtor, the law makes an appropriation according to the order of the items of the account—the first items of the debit side of the account being discharged or reduced by the first items on the credit side” (b).’ If the drawer and discounter of a bill directs the bankers, who hold it, to apply certain funds of his in payment of it, which they agree to do, they cannot afterwards apply these funds to other debts of his, and exact payment of the bill from the acceptor (c).

Conditional
payment.

If a party pays the amount of a debt, due by bill, into a banking-house, under a certain condition, and to remain there in his name till it is fulfilled, he must bear the risk of the banker failing before fulfilment of the condition, though the creditor had desired him to pay the money to the banker generally on his account (d). For the money is thus merely deposited with the banker in the meantime, for the debtor’s behoof.

Partial
payment.

It is settled in Scotland, that the holder of a bill or note may take a partial payment from the acceptor, without cutting off his claim of recourse against the other parties (e). But he must protest the bill in so far as it is not paid (f). A different doctrine was once held in England (g); but it is now settled that the holder may

(a) *Speirs v. Houston’s Executors*, 22 May 1829, 3 W. and S. Ap. 393; *Christie v. Royal Bank*, 6 April 1841, 2 Rob. Ap. 212.

(b) *Lang v. Brown*, 2 Dec. 1859, 22 D. 113.

(c) *Allan v. Allan*, 1 March 1831, 9 S. 519.

(d) *Colley v. Short*, 1 Coop. Eq. Cas. 148.

(e) *Hodgson v. Bushby*, 18 July, 2 Dec. 1782, Morr. 1609; 12 May 1783, 2 Pat. Ap. 607. Although the judgment of the Court of Session was re-

versed in this case by the House of Lords on another ground, both tribunals agreed as to the doctrine stated in the text.

(f) *Marius*, 85-6.

(g) In *Tassel v. Lewis*, 1 Raym. 744, it was ruled, that “if the indorsee of a bill accepts but twopence from the acceptor, he can never after resort to the drawer.” The same doctrine was held in *Kellock v. Robinson*, 2 Str. 745. with regard to a partial payment received from the granter of a promissory-note.

safely take a partial payment from the acceptor, or any other party, without losing his recourse against the other parties for the residue (a). The circumstance of recovering judgment against one of the obligants in a promissory-note, and levying part of the note under it, has been held not to discharge the other obligant (b). But, although the holder runs no risk in taking a partial payment, he is not bound to take less than the whole (c).

The effect of giving indulgence, or granting an absolute or partial release to one obligant in a bill or note, with reference to the holder's claim against the other obligants, shall be afterwards considered.

Although the holder of a bill or note may set it off by compensation against any sum due by him to the debtor, the bill or note, unless given up to the debtor, will not be extinguished, since the holder may transfer it, even after the term of payment, to a third party, whose claim under it, according to various decisions already cited (d), will not be affected by grounds of compensation pleadable against his author. 'As between the holder and the acceptor, compensation can be treated as payment only when established by the holder's writ or oath. Thus the acceptor cannot have diligence on bills suspended, on the ground that if a general accounting were to be gone into, it would be proved he was due nothing to the holder (e); and still less can he delay payment till some illiquid claim of damages be settled, even though the claim arise out of the same transaction as the bill (f). But if the suspender make out a very strong *prima facie* case of payment by compensation, the Court may suspend on consignation or caution. Thus the Court suspended on caution, where a person who had taken a grass park, and (as re-

Compensation.

(a) *Marius*, 86-7, says, that a partial payment may be safely received, and a receipt granted for it on the bill, if a protest is taken for non-payment of the balance. In *Gould v. Robson*, 8 East. 576, such a payment taken from the acceptor was held not to bar a claim for the balance against an indorser; and in *Walwyn v. St Quintin*, 1 B. and P. 652, the taking of a partial payment from an indorser was held not to discharge the drawer

for whose accommodation the bill had been accepted.

(b) *Per* Sir J. Mansfield, C. J., in *Ayrey v. Davenport*, 2 B. and P. New Rep. 476.

(c) *Forbes*, 103.

(d) *Antea*, 190 *et seq.*

(e) *Ewing v. Strathmore*, 19 June 1832, 6 W. and S. Ap. 56.

(f) *M^cGill v. Carrick*, 27 Nov. 1824, 3 S. 325.

quired by the conditions of roup) had granted a bill for the rent to the factor, afterwards received a letter from the principal, desiring him to impute the bill in part payment of an account due by the principal to him (a).'

Confusion.

The same principle seems applicable to that kind of compensation which is called *confusio*, and which occurs when the creditor in a bill or note comes in right of the debtor, for instance, when he takes up the acceptor's succession. An indorsement by him, even when made after that event, would appear to be still effectual to the indorsee. It has been decided (b) in England, that when the payee of a note makes the granter his executor, the note is discharged, and cannot afford ground of action even to an indorsee of the executor. But here the indorser was debtor *ex facie* of the note, and the decision cannot therefore apply, where the creditor succeeds to the debtor.

Novation.

Novation, or accepting a new security in exchange for a bill or note, to its entire extinction, cannot be considered as payment, though it releases the obligants in the original bill or note, unless they are parties to the new security. It has been already stated (c) in what cases novation can be said to have taken place. 'It is enough here to recall, that novation is never presumed, and that there is hardly any case in which the defence has been sustained, where the original document of debt had not been given up, or where there was not some very distinct evidence to show that it had been departed from (d).' Its effect, when conceded to the acceptor or granter, drawer or indorser of a bill or note, in releasing the subsequent parties, shall be afterwards explained (e).

(a) *Alexander v. Monteath*, 6 June 1846, 8 D. 810.

(b) *Freakly v. Fox*, 9 B. and Cr. 130.

(c) *Antea*, 93 *et seq.*

(d) *Per* Justice-Clerk in *Roy's Trustees v. Stalker*, 13 Feb. 1850, 12 D. 722. In this case two parties accepted a bill. On its being dishonoured, the first acceptor granted to the

holder a bond as for money advanced, but qualified by a back-letter purporting that the bond was given in payment and security of the bill. The creditor retained the bill. *Held*, that he was entitled to sue the second acceptor for its contents.

(e) *Vide* Chapter on Negotiation, sect. 5.

SECTION V.

EVIDENCE OF PAYMENT.

1. *Receipt.*

When a party pays a bill or note, he is entitled to a receipt for it (a), 'and to have it re-delivered to him (b).' A receipt distinct from the bill or note, whether for its whole amount, or only for part, will not, as already shown, prevent an onerous holder from recovering second payment (c). It should therefore be written on the bill or note. It has been also held, that bankers getting payment of bills or notes should make a memorandum of payment on the back of them (d). Such a receipt is exempted from the stamps applicable to receipts in general (e). A receipt on the back of a bill or note in the creditor's handwriting (the debtor holding it), cannot be redargued by parole evidence that it was written by mistake (f). Indorsements of interest on a bill or note are presumed to have been written on the date which they bear (g).

A general receipt on a bill or note founds a presumption of payment by the acceptor or granter (h). When, therefore, any other party makes payment, this fact ought to be stated in the receipt. 'If it is not, the payer runs the risk of losing his right of recourse; as the law presumes that any one who pays the debt of another will take a special receipt, showing who made the payment. It is not enough to give a right of relief to the person taking a general receipt, for him to show that he actually paid over the money, and that he still holds the receipt as his voucher, because he may have been the

Receipt.

General receipt.

(a) Chitty, 293; 43 Geo. III. c. 126, § 5. This Act authorizes any debtor paying a debt to present to the creditor a proper stamp, that he may write a receipt on it, and the creditor is required to grant the receipt, under a penalty of L.10 for each instance of neglect.

(b) Thomson v. Izut, 1 Dec. 1841, 4 D. 136; Hansard v. Robinson, 1827, 7 B. and C. 90.

(c) Antea, 189 et seq.

(d) Per Lord Ellenborough in *Burbridge v. Manners*, 3 Camp. 195.

(e) 55 Geo. III. c. 184, sch.

(f) *M'Farlane v. Watt*, 15 Feb. 1828, 6 S. D. 560.

(g) *Smith v. Battens*, 2 M. and Rob. 341.

(h) *Scholey v. Walsby*, 1790, Peake, 25; *Ferguson v. Young*, 29 Nov. 1793, M. 1488.

mere hand in transferring the money from the acceptor to the creditor, and probably took the general receipt just because he was so. Of this rule there are many illustrations. Thus, where a person paid a bill due by his brother, and took a general receipt, it was presumed, because he had done so, that he had paid it with his brother's funds; and he had no recourse (*a*). In the same way, an indorser who paid a bill, and (as he said) in order to preserve the acceptor's credit took a general receipt, and allowed the acceptance to be deleted, was found to have no recourse on the bill, and was limited to proving his advance by the acceptor's writ or oath (*b*). Bills found in the possession of a factor, with a general receipt on them, were similarly presumed to have been retired with the principal's funds (*c*). Again, where one co-acceptor retires a bill and takes a general receipt, the presumption is, that he has no claim of relief to preserve against the other co-acceptor (*d*). And if a general receipt of this kind be taken by a person paying a bill, he cannot get rid of its effect by afterwards deleting it (*e*). The presumption may, of course, be redargued by the acceptor's writ (*f*); and it has been held, that the presumption arising from a partial receipt, in general terms, may be removed by a subsequent special receipt, granted when the whole bill was paid (*g*). In England, it seems to be thought that the principle has been carried quite far enough, and that sufficient weight has not been allowed to the counter presumption, arising from the possession of the discharged instrument (*h*).'

Receipt for
payment by
indorser.

In England, an indorser, claiming reimbursement from the acceptor for the amount of a bill, which he alleged that he had paid, was held not to have proved payment merely by producing the bill with a protest on it, since it was said to be the usage of merchants

(*a*) *Webster v. Thomas*, 15 Jan. 1819, F. C.

(*b*) *Martin v. Smith*, 8 Dec. 1854, 17 D. 143.

(*c*) *Jackson v. Williamson*, 9 Dec. 1825, 4 S. 292; *Garnock v. Wilson*, 22 July 1714, M. 11530.

(*d*) *Campbell v. Cockburn*, 7 Dec. 1728, M. 11434; *Baillie v. Wilson*, 28 Jan. 1840, 2 D. 495; *Milne v. Donaldson*, 10 June 1852, 14 D. 849.

(*e*) *Brown v. Kerr*, 14 June 1809, H. 62.

(*f*) *Ewing v. Strathmore*, 13 Dec. 1825, 4 S. 310; 19 June 1832, 6 W. and S. 56.

(*g*) *Soutar v. Soutar*, 29 June 1827, 5 S. 876.

(*h*) *Phillips v. Warren*, 1845, 14 L. J. (Ex.) 280.

that there should be also a receipt on the protest; but Holt, C. J., seemed to think that any other proof of payment would have been sufficient (a). In Scotland, a written receipt would have been required. In a case, where it appeared from a receipt on the bill that it had been paid by the indorser, the mere circumstance of the drawer being afterwards in possession of it, without a receipt by the indorser to him, was found not to found a presumption that he had repaid it to the indorser, or to give him a claim for it on that ground against the acceptor (b). The bill being dishonoured *ex facie*, the drawer had no interest in it, without evidence that he had repaid its amount to the person who appeared to have first paid it.

A receipt on a bill written by the creditor, and found among his papers after his death, will not afford evidence of payment; because, as the bill was not delivered, the receipt must be presumed to have been written merely *spe numerandæ pecuniæ* (c). The debtor ought, therefore, in all cases, to insist on delivery of the bill or note when he makes payment. So long as it is out of his possession, he may be liable to a demand for second payment (d). A bill or note delivered with a receipt "to account of it," is effectual, unless redargued by the debtor's writ or oath, and cannot be met by parole evidence, that the receipt was granted by mistake, and that the payment was made on another account (e).

Undelivered
receipt.

2. Indirect Evidence of Payment.

Besides a formal receipt, there are other means of proving payment, which seem to resolve, either into the evidence afforded by the creditor's own writ (or oath), or into circumstances independent of writing, which instruct payment *rebus ipsis et factis*.

Indirect
evidence of
payment.

The following are instances of the first of these modes. In a case (f) where a person charged as cautioner in a bond suspended, on the ground that the bond had been given in consideration of two

Evidence by
writ

(a) *Mendez v. Careroon*, 1 Raym. 742.

(b) *Alston's Assignee v. Mather*, 27 Jan. 1824, 2 S. 648.

(c) *Cochran v. Pringle*, 20 July 1709, Morr. 12714.

(d) *Hart v. Newman*, 3 Camp. 13;

Buzzard v. Flecknoe, 1 Stark. 333;

Brombridge v. Osborne, 1 Stark. 374;

Woodroffe v. Hayne, 1 C. and Pay. 600.

(e) *M. Farlane v. Stott*, 15 Feb. 1828, 6 S. and D. 56, F. C.

(f) *Skene v. Lumsden*, 4 Feb. 1662, M. 12620.

bills granted by the charger to the principal obligant, the payment of these bills was held to be instructed by the payee's books, joined to some other adminicles of evidence. In another case (*a*), where an action was brought against a tenant on a bond, and a bill or precept, it was held that a fitted account in the tenant's possession, drawn out by the landlord's factor, though not subscribed by him, and in which both debts were marked as paid, formed good evidence of payment against the landlord. Again (*b*), where an action was brought on a bill for the rent of a particular year, the production of three subsequent consecutive receipts for rent, the last of which discharged all precedings, with the circumstance of no claim having been made by the original payee for several years till his death, was held to prove payment. In an action (*c*) by the representative of the creditor in a bill against the acceptor, though the bill was still in the pursuer's possession, it was decided that certain jottings on it, holograph of the creditor, from which it appeared that the whole had been paid excepting a balance of L.63, 10s., formed good evidence; the creditor's books proving that he had no other transactions with the defender, and it being improbable that he would insert an extraneous account on the bill.

or oath.

Payment may also be proved by the creditor's oath. But it must be taken with the qualifications annexed to it. For instance (*d*), where the creditors on such a reference admitted that they had got in payment a conveyance to certain shares of a vessel, but added that the free proceeds amounted only to L.43, it was held that the oath must be taken with this qualification. It was not extrinsic, as in some cases to be afterwards mentioned (*e*), of parties who, on the subsistence of a debt being referred to them, depone that it is compensated by a counter claim, but formed an ingredient of the matter referred. When a creditor, pursuing for a bill, admits that it was granted for a certain account, the Court will not allow possession of the bill to exclude inquiry, whether some items of the account were otherwise discharged (*f*).

(*a*) *Ainslie v. Chisholm*, 13 Feb. 1696, M. 12626.

(*b*) *Homes v. Anderson*, 5 Dec. 1744, M. 11401.

(*c*) *Watson v. Smith*, 9 Feb. 1709, M. 12713.

(*d*) *Stewart v. Telfer*, 5 July 1821, 1 Sh. 101.

(*e*) See *postea*, Chap. VIII. sect. ii.

(*f*) *Mills v. Hamilton*, 19 Feb. 1830.

8 S. 570.

Of the second kind of evidence now mentioned, viz., that of facts and circumstances, there is an instance in a case (a), where the creditor in a promissory-note having allowed it to lie over without demand for five years and ten months, and there being other circumstances from which payment was to be presumed, the Court, though the sexennial prescription had not taken place, decided that there was evidence of payment. It has been laid down in an English case (b), and the doctrine seems applicable in Scotland, that when the evidence of payment is doubtful, "the possession of the uncanceled security by the claimant ought to turn the scale in his favour, since, in the ordinary course of dealing, the security is given up to the party who pays it." The possession, therefore, of a bill or note by the debtor will form one presumption that he has paid it. But the mere possession of a banker's check by the party who had granted it, and the circumstance of another banker's name being written across it, so as to point him out as the party to whom it was payable, was found not sufficient to prove either that it had been paid in to this banker on account of a particular party, when there was no other evidence that this party had got its amount, or been credited with it in the banker's books; or to prove that the drawer, though it was now in his possession, had retired it (c). Further, when a master was in use to draw bills on his debtors payable to his servant, that the latter might discount them with the bank, and indorse them on his account, but one bill, in consequence of the drawee refusing to accept it, had not been discounted, and remained unnoticed in the servant's custody till his death, when his executors brought an action for it against the master (though the servant had neither made use of it, nor taken notice of it in his settlement, in which more trivial things were mentioned), the Court decided that this bill must be understood to have been drawn for the master's behoof, and that therefore the servant could have no more right to it than to his master's money deposited with him.

Evidence from facts and circumstances.

(a) *Russell v. Fraser*, 13 June 1788, Morr. 11890. *Vide* cases of payment of a bill inferred from facts and circumstances, in *Crichton v. Watt*, 11 July 1833, 11 S. 964, and *Ryrie v. Ryrie*, 26 June 1840, 2 D. 1210; and a case in which the facts did not raise the

presumption, in *Irvine v. Lang*, 6 Mar. 1840, 2 D. 804.

(b) *Per* Lord Ellenborough, in *Brombridge v. Osborne*, 1 Stark. 374.

(c) *Byer's Assignees v. Crossley and Others*, 2 C. and Pay. 213.

They also held that this case did not fall under the Act 1696, c. 25, which required trust to be proved by the trustee's writ or oath, but that a presumption of trust was created by the course of dealing between the parties. (a). The possession of a bill, however, by the proper debtor will, in general, create a presumption *per se* that he has paid it, although this presumption may be redargued by evidence that he has got it by accident or fraud. This was found by the Court in a case (b) where a bill, having been abstracted from a messenger with whom the creditor had placed it, and having got into the debtor's hands, not without suspicion of fraud, the creditor was found entitled to re-delivery of it.

SECTION VI.

PAYMENT BY MISTAKE.

Payment
under mistake
as to facts.

If a person has paid money under a misapprehension of facts, without being legally bound, he may recover it, when the holder has been guilty of wilful concealment. For instance, when the holder of a check, which was post-dated, and consequently void, presented it to the bankers on whom it was drawn, in the knowledge of that circumstance, and also of the insolvency of the drawers, but without mentioning these facts, and the bankers were led, by his concealment, to pay the check, though they had not then funds of the drawers in their hands, they were found entitled to recover back from him the money so paid (c). A person is likewise entitled to recover back, even from the *bona fide* holder of navy bills and victualling bills, money paid by him without consideration, in consequence of the fraudulent insertion of sums beyond those for which the bills were granted (d). It was here held, that the party who

(a) *M'Laren v. Chesly's Executors*, 8 Feb. 1710, M. 12756. *Vide Jackson v. Monro*, 2 Dec. 1714, M. 16197, where trust was presumed from circumstances (as to a bill), without the proof required by Act 1696, c. 25.

(b) *Edward v. Fyfe*, 26 June 1823, 2 S. 431.

(c) *Martin v. Morgan*, 1819, 3 Moore, 635.

(d) *Bruce v. Bruce, and Jones v. Ryde*, 1814, 5 Taunt. 488-495. The person who was found entitled to recover, had discounted the bills. Neither he nor the person from whom he got them had any knowledge of the fraud that had been practised.

had got value to the apparent amount of those bills, was bound to warrant that amount, or to refund the difference. So, the indorser of a bill was found entitled to recover back its amount from the indorsee, on discovering that the latter had not given notice of the non-payment, in due time after receiving it (*a*). In a case (*b*), also, where the indorser of a bill, who had given it to the indorsee, in payment of a previous debt, paid this debt to the latter, though he knew that he had not negotiated the bill, in the belief that it was void for want of a proper stamp, he was found entitled to repetition, on discovering, what he had no means of knowing at the time of payment, that it had been drawn in Ireland, where the stamp was legal. The rule laid down in this case appears to have been, that a party cannot recover back a payment made under a mistake in law, but that he may, if it is made under a mistake as to a fact, which he neither knew nor had the means of knowing. But he has no claim for repetition against any other party to the document (*c*).

A person accepting and paying one bill, and then paying another drawn by the same person to the same *bona fide* holder, cannot recover back the amount of the last bill, on the ground that the drawer's signature is forged; as he ought to have ascertained this fact before he gave either of the bills credit by accepting and paying them (*d*). It has been also decided (*e*), that bankers could not recover back money paid by them on account of a customer, under an acceptance of his which turned out to be forged, seeing they ought to have ascertained whether it was genuine before paying the bill. But they are not bound (however much it may be for their interest) to ascertain the genuineness of an acceptance before discounting a bill; but, if the bill should turn out to be forged, are entitled to recover its amount from the party to whom they discounted it, by virtue of his indorsement (*f*). It was not even admitted as a defence, that he had discounted the bill merely as agent for another party, to whom he paid the amount before hearing of

Payment of
forged bills.

(*a*) *Batchin v. Orr*, 1792, M. 1619; H. 38.

(*b*) *Milnes v. Duncan*, 1827, 6 B. and Cr. 671.

(*c*) *Post*, on Negotiation.

(*d*) *Price v. Neal*, 3 Bur. 1354.

(*e*) *Smith v. Mercer*, 6 Taunt. 76; *Roberts v. Tucker*, 1 Feb. 1851, 20 L. J. (Q. B.) 270; *British Linen Co. v. Caledonian Insurance Co.*, 19 Mar. 1861, 4 M'Q. Ap. 107.

(*f*) *Fuller v. Smith*, 1 C. and P. 197.

the forgery. In another case (a), where the holder presented it to the bankers of one of the supposed indorsers, who might pay it for his honour, which they did, they were entitled to recover back the amount from the holder, the payment turning out to be a forgery, as his conduct had led them to believe that it was genuine, and he demanded repetition the same day that they paid it. It is, however, held that they could not recover, when they demanded repetition till the next day; it being held that they must make the claim the same day, so as to enable the holder to have immediate recourse against the other claimants (b). These cases were distinguishable from two cases of navy bills already noticed, because in the former the bank was required to ascertain the genuineness of the signature of the indorser, whereas in the latter there were no grounds for suspicion. On the same principle a bill broker who discounts (or indorses) a bill with a bank, was found liable when it was discovered that the bill was a forgery (c).

Payment
under mistake
as to law.

It would appear, notwithstanding the opinion already expressed, that a party paying through mistake is entitled to recover from the person to whom payment was made, though it arose from a mistake in point of law (d). 'In England it is settled that a party is entitled to the recovery of money paid under such a mistake (e)'. Similar opinions have been expressed in the House of Lords and in Scotland must be similar (f). It is, however, held that if a person is induced by a misrepresentation of the law, not fraudulently made, to accept a bill for a sum of money,

(a) *Wilkinson v. Johnson*, 3 B. and Cr. 428.

(b) *Cocks v. Masterman*, 9 B. and Cr. 902.

(c) *Gurney v. Womersley*, 4 Nov. 1854, 22 L. J. (Q. B.) 46.

(d) *Antea*, p. 271.

(e) *Ersk.* iii. 3, 54. *Vide* also opinion of the Court in *Carrick v. Carse*, 5 Aug. 1778, M. 2931. In this case, a party was reponed against a payment made under a cautionary obligation, in respect of the lapse of the seven years. He admitted that he

knew the law on the subject, but alleged that he was induced to do so by the representation of the law. The Court held that he was not entitled to redress, and that whether it had arisen from the law or of the fact was immaterial.

(f) *Brisbane v. The Mayor of Edinburgh*, 10 D. 143.

(g) *Wilson v. The Glasgow and S. Ap. S. Co.*, 4 W. and S. Ap. 381, 17 Sept. 1831, and S. Ap. 445. See some observations on these cases in *Dickson v. The Glasgow and S. Ap. S. Co.*, 17 Feb. 1854, 16 D. 586.

he does not owe, that amounts to a failure of consideration, partial or entire, and is, *pro tanto*, a good defence to an action on the bill (a).'

Although a party has got money from the acceptor of a bill to satisfy it, he will be entitled to plead any objection to the title of the holder, which could have been pleaded by the acceptor, for instance, in England, that the original payee indorsed it to him after committing an act of bankruptcy, in which case, he holds the money for behoof of the other creditors (b).

The claims of recourse arising to the drawer, and other parties, in bills or notes, from their payment of them, shall be afterwards considered in the chapter on Action and Diligence.

(a) *Southall v. Rigg*, and *Forman v. Wright*, 13 May 1851, 20 L. J. (C. P.) 145. (b) *Redshaw v. Jackson*, 1 Camp. 372, per Lord Ellenborough.

CHAPTER VI.

OF THE NEGOTIATION OF BILLS AND NOTES, AND THE CONSEQUENCES OF FAILURE IN DUE NEGOTIATION.

Negotiation.

WE must now suppose that the drawee of a bill refuses to accept, or that the drawee of a bill or granter of a note fails to pay. The holder is then entitled to sue the drawer, or any of the indorsers immediately (*a*), for the amount of the bill or note; but only on showing that he has done all which is required for due negotiation. It will likewise, in general, exclude his claim against subsequent parties to a bill or note, if he has released, given time, or innovated the debt in favour of a prior party against whom they had a claim of recourse. This part of the subject, therefore, includes all the requisites of negotiation, as well as the consequences of failure in negotiation, and the question how far discharge or indulgence given to one party will release others. We shall consider,

Division of
subject.

I. The requisites of presentment of bills or notes: 1. For ~~a-c~~ acceptance; 2. For payment.

II. Protest, both for non-acceptance, and for non-payment.

III. 1. Acceptance } *supra* protest.
2. Payment }

This last subject, though not falling strictly under negotiati~~o~~ has been included in it; because a previous explanation of prese~~o~~ ment and protest is necessary to make it intelligible.

IV. Notice necessary on non-acceptance or non-payment, a~~o~~ in what cases it may be dispensed with.

In considering these different requisites, we shall discuss t~~o~~

(*a*) *Siggars v. Lewis*, 1 C. M. and R. 370.

consequences of failure in any of them, which resolve generally into the loss of recourse.

V. Effect of novation, release or indulgence to any one of the obligants on the holder's claim against the other obligants.

In discussing these points, it shall be considered how far the doctrines with regard to them are modified by the circumstance of the bill or note being accepted, granted, or indorsed without value, or, in other words, being an accommodation-bill or note.

SECTION I.

PRESENTMENT.

1. *Presentment for Acceptance.*

(1.) *Of what bills or notes is presentment for acceptance necessary?*

Presentment of promissory-notes is held to mean only presentment for payment, no separate presentment for acceptance being required (a). As to bills, a bill payable on a precise day, or within a certain time after its date, need not, in general, be presented till it becomes due (b). The drawer being certiorated of the term of payment, is bound to have funds *at that time* in the drawee's hands to answer it; and it is his business to secure the drawee's acceptance, if the bill should be presented, by either putting him in funds immediately, or satisfying him that he will be in funds before the term of payment. 'If a person guarantee that bills with a fixed term of payment will be regularly accepted, he is liable on their non-acceptance, though the bills should not be presented till matu-

Holder need not present for acceptance bills drawn payable at a certain time,

(a) *Sutton v. Toomer*, 7 B. and C. 416.

(b) *Beawes*, No. 266; *Molloy*, 2, 10, 16; *per Lord Mansfield*, C. J., in *Blessard v. Hirst*, 1770, 5 Burr. 2672; *per Gibbs*, C. J., in *O'Keefe v. Dunn*, 1815, 6 Taunt. 621-2; *per Lord Ellenborough* in *Orr v. Maginnis*, 1806, 7 East. 359. In Scotland, in *Ferguson v. Malcolm*, 16 Feb. 1727, M. 1558, the Court found "that the bill

being drawn payable on a place and day certain, there was no necessity of a protest for non-acceptance." In *Jamieson v. Gillespie*, 28 June 1749, M. 1579, after a report of merchants as to the practice, it was held sufficient negotiation to protest for non-acceptance as well as non-payment of a bill of this kind, within the days of grace. The same thing was held in *Philpott v. Bryant*, 3 C. and P. 244.

unless he be
merely an
agent,

rity, and even though it should appear that they would have been **ac-**
cepted had the holder presented them without unnecessary delay (*a*).'

There is an exception, however, to the rule as to presentment for acceptance when the holder of the bill is merely agent for the creditor; because, till acceptance, the creditor has no security for payment but that of the drawer, and would therefore have a claim against his agent, if, through his neglect, the drawer should become insolvent before the drawee accepts (*b*). Accordingly (*c*), where an agent for a bank at Greenock discounted a bill there, and then transmitted it to the bank agent at Glasgow, where the drawee resided, to get it accepted, which, according to the practice, it was his duty to do, but the Glasgow agent neglected to do so for four days after receiving it, viz., till the day of payment, when the drawer had failed, in consequence of which the drawee refused to accept, he was found liable on that account for the bill, under deduction of a dividend from the drawer's estate. One argument for him was, that it was customary not to present bills drawn at so short a date (four days), for acceptance, but to keep them till the day of payment. But this argument was disregarded. 'In England, the agent in such a case would be liable in damages (*d*).'

or be desired
by the payee
to do so.

Even the payee is bound to present the bill immediately for acceptance, if the drawer has desired him to do so (*e*).

But such pre-
sentment is in
all cases
advisable;

Such presentment, indeed, is advisable in all cases; because, if the bill is accepted, it becomes thereby more negotiable (*f*); whereas, if acceptance is refused, the holder has immediate recourse on the drawer (*g*).

(*a*) *National Bank v. Robertson*, 3 Feb. 1836, 14 S. 402. The cause of the drawee's refusal to accept was the intervening bankruptcy of the holder.

(*b*) This doctrine is well explained by Pothier, No. 128.

(*c*) *Dunlop v. Hamilton and Co.*, 16 Jan. 1810, F. C., 1 Bell, 409, note 2.

(*d*) *Van Wart v. Wooly*, 3 B. and C. 439.

(*e*) 1 Bell, 409.

(*f*) *Marius*, 48; *Beawes*, No. 266.

(*g*) *Milford v. Mayor*, 1779, 1 Doug. 55; *Ballingall v. Glosters*, 1803, 3 East. 481; *Allan v. Maurson*, 4 Camp.

115. In these cases, a claim of course made against the drawer immediately on the non-acceptance of bill, was sustained. In *Whitehead v. Walker*, 31 Jan. 1842, 2 M. and W. 506 (where it was decided that statute of limitations ran from refusal to accept), these cases are viewed and confirmed. In *Cowan v. Kay*, 20 June 1795; M. 1621, a having been protested for non-acceptance, a charge upon it against drawer was found competent, though given prior to the term of payment.

When a bill is payable at a certain time after sight, presentment for acceptance is necessary to fix the term of payment (*a*). And according to the authorities already cited (*b*), which appear to lead to the conclusion, that bills drawn at sight are not payable on demand, but that days of grace should be allowed on them, it follows, that they must be first presented for acceptance, to determine the currency of the days of grace (*c*). It has been also held, even as to a note payable on demand "at sight," that no action can be maintained on it without proving presentment for sight (*d*). and in bills at or after sight, is necessary.

But such presentment is not necessary, if the bill is drawn on too low a stamp; because it is then null (*e*), and the holder may sue on the consideration for which it was granted, though he has neglected to present it (*f*). He will have no ground of action, if his claim rests on the bill alone. Case of bill on too low a stamp.

Although the bill should have no address, yet, if the holder is advised by the drawer who was meant as drawee, he ought to present it, and protest it on non-acceptance, that there may be recourse against the drawer (*g*). Case of bill without an address.

If a bill has been once presented for acceptance, but dishonoured, and the drawer admits the non-acceptance, but says that it will be accepted if presented a second time, he cannot plead want of negotiation though the bill should not be so presented, or argue that the holder, if he did not choose to present it again, should have returned it (*h*). Two presentments for acceptance never necessary.

(2.) *At what time?*

As to the time when a bill payable after sight should be presented for acceptance, the only rule is, that the holder ought to use no undue delay, but should present within a reasonable time (*i*). Unless there were some restriction, the drawer could not know how long he should keep funds in the drawee's possession to answer the When bills after sight should be presented for acceptance.

(*a*) *Per Eyre, C. J., and Buller, J., in Muilman v. D'Eguino*, 2 H. Bl. 562; *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth, R. and M.* 389.

(*b*) *Antea*, p. 247.

(*c*) *Story* (§ 228) is also of this opinion.

(*d*) *Dixon v. Nuttall*, 4 Tyrwh. 1013.

(*e*) *Wilson v. Vysar*, 4. Taunt. 288.

(*f*) *Ruff v. Webb*, Esp. 125; *Swears v. Wells*, 1 Esp. 317. See *antea*, p. 23.

(*g*) *Marius*, 142-3.

(*h*) *Hickling v. Hardy*, 7 Taunt. 312, *per Dallas, C. J.*

(*i*) *Pothier*, No. 143; *Bayley*, 227; *per Bayley, J., in Muilman v. D'Eguino*, note (*a*). The same doctrine is fully explained by *Forbes*, 65-6.

bill, if it was not presented; or he might suppose, if he heard nothing to the contrary, that it had been accepted and paid, and might thus be led to credit the drawee with a proportionally larger sum. The doctrine, therefore, that the holder of a bill payable after sight may use his discretion as to the time of presenting it, is now exploded. Such a doctrine was maintained in Scotland in an early case (*a*), where it was found that a bill on London, payable at fourteen days' sight, was duly negotiated, when not presented till 22d June, though it must have reached London on 12th June. In a subsequent case (*b*), the same argument was urged, and the Court held that there was sufficient negotiation. But they probably proceeded on the circumstances of the case, which afforded a good excuse for the delay. In another case (*c*), where the holders of a bill drawn at three days' sight had received and transmitted it for acceptance on 7th May, but allowed it to remain in the drawee's hands, without getting his answer or protesting it, or giving notice to the indorser till 5th June, though the drawee himself protested it for non-acceptance on 31st May, the Court decided that recourse was lost. They seem to have held that the protest was the only proper evidence of presentment. The grounds of decision are not specified; but the indorser argued, that even bills payable after sight must be presented within a reasonable time. No distinction has been ever made on this point between foreign and inland bills, in Scotland or in England.

What a reasonable time?

But the application of the rule depends on 'circumstances' (*d*). The holder of a bill payable after sight will lose his recourse, if he keeps it locked up for a length of time without presenting it (*e*). But it has been held, that a person receiving at Windsor a bill of this kind drawn on London, negotiates it duly, though it has not been in circulation in the meantime, if he presents it on the fourth day after receiving it (*f*); and, with regard to a bill by country bankers

(*a*) *Innes v. Gordon*, 7 Feb. 1735, Morr. 1562; *Elchies, No. 6, v. Bill*. Mr Forbes, 67-70, lays down the rule nearly as it is now established.

(*b*) *Andrew v. Syme*, 21 Nov. 1759, Morr. 1584.

(*c*) *Falls v. Porterfield*, 17 June 1766, Morr. 1593.

(*d*) In England the jury say what

is a reasonable time. *Straker v. G* *ham*, 4 M. and W. 721. But see 298.

(*e*) Per Buller, J., in *Muilman D'Eguino*, 277, note (*a*).

(*f*) In *Fry v. Hill*, 7 Taunt. 397, verdict to this effect was confirmed, Court of C. P. holding the question properly left to the jury.

on their London correspondents at twenty days' sight (a), it has been held that there was no undue delay, though it was received on 17th November, and not sent off for Bristol till the 24th, in consequence of which it did not reach London till the 29th. As to bills drawn on India at sixty days' sight, it has been decided (b), under special circumstances, that they were duly negotiated, though not formally presented for acceptance till twenty-six days after their arrival; the drawee, however, having had notice, and having been requested to accept them two days after their arrival. In the same case, it was held, that there was no undue delay in not sending the bills from this country to India for acceptance, from 5th March to 30th April, the plaintiffs being, during that interval, in correspondence about them with a house in Paris, for whose behoof they had taken them, and having transmitted them as soon as they received directions on the subject. In a later case (c), where a foreign bill payable at sixty days' sight, and at a rate of exchange amounting to 22d. *per* milrea, had been purchased on 10th September, and not sold again till 1st February (the rate of exchange having begun to fall immediately after the purchase, and having fallen, before 1st February, to 17d. *per* milrea), it was held, that the plaintiff had not retained it an unreasonable time, so as to bar him, on the drawee's failure, from claiming its amount against the drawer, and that he was entitled, in a falling market, to keep it a reasonable time with a view to the price rising, so as to indemnify him against loss. It was stated to be usual, when the drawee wished to limit the time, that he either sent another part of the bill for acceptance, or stipulated, on a sale, that it should be transmitted within a certain time; and it was inferred, that, as he had not done so here, he must have taken his chance of its being retained a reasonable time.

The holder of a bill payable after sight, whether foreign or inland, may put it into circulation before acceptance (d), and it must then depend much on the continuance of its circulation when it should be presented for acceptance. In one case (e), it was de-

What if bill
put into
circulation?

(a) *Shute v. Robins*, 1 M. and Malk.
133, 3 C. and Pay. 80.

(b) *Muilman v. D'Eguino*, 2 H. Bl.
565.

(c) *Mellish v. Rawdon*, 9 Bingh. 416.

(d) *Per Gibbs*, C. J., in *Fry v. Hill*,
antea, 278, note (f).

(e) *Goupy v. Harden*, 7 Taunt. 159.

cided, that foreign bills drawn at thirty days' sight, which, having been put into circulation, were not presented for acceptance till some months after being issued, had been duly negotiated, though the drawees had continued to honour the drawer's bills for forty days after their date, and though the drawer did not fail till that period had elapsed. Courts have refrained from limiting any time within which bills of this kind, when thus put into circulation, must be presented; holding that this must be determined by the circumstances of each case (*a*). It has been even laid down, that such a bill might be safely kept in circulation for a year without presentment (*b*).

Bills at sight.

The rules now laid down as to the time of presenting for acceptance bills payable *after* sight, appear to be equally applicable to the case of bills payable at sight.

Time of day for presenting.

Presentment should, in all cases, be made at a seasonable time of day; and when the drawee is a banker or merchant, it ought to be made during the usual hours of business (*c*). As to the proper time of day for presentment, the reader is referred to Presentment for Payment, the rules regarding which are applicable also to presentment for acceptance.

When timeous presentment excused.

The failure to present in due time may be excused by any sufficient reason not arising from the holder's misconduct, such as illness, intervening war, unavoidable detention, etc. (*d*). It was held, for example, to be a sufficient excuse for delay in presenting a bill, that the town of Leghorn, where presentment ought to have been made, was then occupied by the enemy; Lord Ellenborough laying it down, that the rules as to due presentment were always subject to the exception of such unavoidable accidents as rendered it impossible (*e*). 'The same rules excuse delay in presenting for acceptance, as excuse delay in presenting for payment or in giving notice of dishonour (*f*), and will therefore be hereafter more fully explained.'

(*a*) *Per* Gibbs, C. J., in *Goupy v. Harden*, 279, note (*e*); and *per* Eyre, C. J., in *Muilman v. D'Eguino*, *antea*, 277, note (*a*).

(*b*) *Per* Buller, J., in *Muilman v. D'Eguino*, *ibid.*

(*c*) *Vide* on this subject Marius, 112, who gives some curious details as

to the hours of business in London during his time.

(*d*) For instance of a valid excuse, *vide* *Andrew v. Syme*, 278, note (*b*), and *Forbes*, 68-9; also *Muilman v. D'Eguino*, 277, note (*a*).

(*e*) *Patience v. Townly*, 2 Smith, 224.

(*f*) *Chitty*, 191, n. 6; *Story*, § 234.

(3.) *To, or by whom, and where?*

Presentment, to be effectual, must be made to the drawee himself, or to his authorized agent (a). A bill drawn on a banker or trading company ought to be presented to them at their place of trade, within the ordinary hours of business (b); when it is drawn on an individual, it may be presented to him either at his place of business during business hours, or at his dwelling-house, or personally, if no place of payment is expressed (c). 'When a bill is drawn on a firm, it must be presented to one of the partners (d); and when drawn on several persons not in partnership, it must be presented to each of them (e), though, if one of them refuse, the holder need not go further, as he is not bound to take an acceptance unless all accept (f).' If the drawee cannot be found at the place described in the bill as his residence, and it appears that he never lived there, or has absconded, the bill ought to be immediately protested there for non-acceptance (g). But if the drawee has only changed his residence, the holder must use all endeavours to find out his new residence, and present the bill to him there as soon as possible (h). 'In England it is for the jury to say whether due diligence in this respect has been used (i).' If the drawer has

To whom
presentment
for acceptance
to be made.

(a) In *Check v. Roper*, 5 Esp. 175, where the witness called to prove presentment stated that he went to the drawee's house, and offered the bill for acceptance to a person in his tanyard, who refused to accept (not being certain, however, that this person was the drawee), Lord Ellenborough held, that presentment was not proved, and that therefore there could be no recourse against the drawer.

(b) 1 Bell, 412. (c) *Id.* 413.

(d) Story, § 229. (e) Chitty, 188.

(f) Story, § 229, n. 3.

(g) Chitty, 192. In *Anon.* Raym. 745, it is laid down as the custom of merchants, that if the drawee absconds before the day of payment, there may be a protest immediately for better security, and a protest afterwards for non-payment, on the arrival of the term of payment, but not sooner.

(h) In *Collins v. Butler*, 2 Str. 1087, it was held, that the indorsee of a promissory-note suing the indorser had not established enough to make good his recourse, by merely proving that the maker's house was shut up, because he was bound to have inquired after him and presented the note. The same general doctrine was held regarding ignorance of a party's residence, when stated as an excuse for not notifying to him the dishonour of a bill, in *Bateman v. Joseph*, 2 Camp. 461, 12 East. 433; *Beveridge v. Burgess*, 3 Camp. 262; and *Browning v. Kinnear*, 1 Gow, 81.

(i) *Burmester v. Barrow*, 22 Jan. 1852, 21 L. J. (Q. B.) 135. This case related to the discovery of the drawer's address in order to give him notice of dishonour, but the principle is the same.

left the kingdom, it has been held sufficient in England to present the bill at his house (a). In Scotland, if the drawee cannot be found, it has been said that the holder should present and protest the bill at the market-cross of the place where he last resided (b). In this case, the protest ought to bear, that strict search has been made for him (c). But if there is some person who represents him in this country, presentment ought to be made to him (d). If there are two persons of the drawee's name and designation, and neither will accept, a protest ought to be taken against both (e).

What if drawee
or holder be
dead?

It has been said, that if the drawee is dead, the holder should present it to his nearest heirs, and protest it on their refusal to accept, though they have not yet taken up his succession (f). This should certainly be done where the drawee's heirs have taken up his succession. But otherwise, there is no person representing him, as to the bill, and the presentment of it to them appears as futile as if made to a stranger. In such a case, it seems necessary that the holder should, within a reasonable time, notify to the other parties the drawee's death, by which presentment has become impossible.

When the creditor is dead, and his heirs have not taken up his succession, it has been stated, that they are bound to present for acceptance and payment, and to protest for non-acceptance and non-payment (g). But the sounder opinion appears to be, that they are not bound, as there is no party entitled to demand payment and grant a discharge, or to protest for non-acceptance or payment (h). It has been indeed held, that the mere possession of a bill is a warrant to present and protest for non-acceptance (i). But posses-

(a) This was ruled by Lord Ellenborough, in *Cromwell v. Hynsom*, 2 Esp. 311, where the bill was presented at the drawer's house to his wife, who was also fully apprised of all the circumstances, while he was in Jamaica.

(b) 1 Bell, 409, referring to Forbes, 120. Menzies, p. 366, recommends the protest to be made at the exchange also; and, if the acceptor is out of the county, also at the market-cross of Edinburgh and the pier and shore of Leith. See *postea*, p. 309.

(c) Forbes, 120.

(d) 1 Bell, 413. In *Firth v. Thrush*, K. B., 1828, 8 B. and Cr. 397, the same

doctrine is implied with regard to notice. In *Phillips v. Astling*, 2 Taunt. 206, where the drawee's sister, being his authorized agent, had accepted the bill during his absence, an objection that it had not been afterwards presented to her for payment, was sustained.

(e) Scarlet, C. 11, R. 14.

(f) Pothier, 146. Molloy, 2, 36, lays down this rule with regard to protest for non-payment, where the drawee has died after acceptance.

(g) Marius, 134-5.

(h) Molloy, 2, 10, 34.

(i) *Per Hope, J. C., Elder v. Young*, 15 Nov. 1854, 17 D. 56.

sion merely creates a presumption, that the possessor is authorized to act for the creditor, which presumption his death does away.

Bills must be presented at the same place for acceptance and for payment, and therefore this matter shall be afterwards considered with reference to both subjects. 'The only explanation which it is requisite to give here is, that if the bill be drawn payable at a place different from the place of domicile of the drawee, the presentment for acceptance must be at the latter, because, even supposing the drawee to be aware where the former is, he cannot be expected to remain (from home) in attendance at it to accept whenever the bill may happen to be presented (a).'

Where such presentment to be made.

2. *Presentment for Payment.*

It has been already shown that presentment for acceptance is not necessary with bills payable on demand, or at a specified time. But they must be duly presented for payment to the drawee or granter, in order to establish recourse against the other parties (b), and such presentment, as well as the drawee's failure to pay, must be properly instructed (c). In Scotland, the only admissible proof of this, 'when wanted as a foundation for summary diligence,' is a protest, of which afterwards. Such presentment appears to be also necessary, with bills or notes payable at or after sight, or on demand, to complete the holder's claim even against the drawee or granter (d).

When presentment for payment necessary.

What has been said regarding the non-presentment for acceptance of bills unstamped, or illegally stamped, and also as to the excuses arising from the impossibility of presenting for acceptance, is applicable to the presentment of bills or notes for payment (e).

(a) Chitty, p. 191; Story, § 235; *Mitchell v. Baring*, K. B. 1830, 10 B. and C. 4.

(b) In *Collins v. Butler*, 2 Str. 1087, it was found, *inter alia*, that payment of a note ought to have been demanded from the maker, before charging the indorser.

(c) *Giles v. Powell*, 2 C. and Pay. 259.

(d) In *Holmes v. Kerrison*, 2 Taunt. 323, it was held that the statute of limitations on a note payable after

sight could not take effect without presentment. In *Stephenson v. Stephenson's Trustee*, 16 June 1807, Morr. App. v. Bill, No. 20, it was found, on the other hand, that the sexennial prescription on a bill payable on demand runs from its date, in respect of the words of the Act, by which the prescription runs from the time when bills or notes are exigible.

(e) *Autea*, pp. 277, 280; *Terry v. Parker*, 5 May 1837, 6 L. J. (K. B.) 249.

(1.) *To whom—by whom?*

To whom such
presentment
to be made.

When the debtor in a bill or note cannot be found, the same rules appear to be applicable to presentment for payment, which have been explained as to presentment for acceptance (a). But it has been also decided (b), that presentment for payment at the acceptor's house, with refusal, though the acceptor was not found personally, is sufficient to preserve recourse, it being held, that the acceptor was bound to have funds there to make payment. It has been decided in England (c), that the circumstance of a banking company shutting up their bank, and thereby refusing to pay their notes, does not amount to a declaration that they will not pay certain specific notes sued for, which are payable on being presented at their bank, and, consequently, does not supersede the necessity of presentment, in order to give the holders a complete claim against them. Their mere insolvency, though thus declared by themselves, does not dispense with the necessity of presentment. But a timeous offer to return the notes of a bank which has failed to the party from whom they were received, is sufficient, without presenting, to preserve recourse against him (d). When the drawee of a bill has gone abroad, and left an agent in England with power to accept bills for him, and the agent has accordingly accepted a particular bill, it ought to be presented for payment to the agent, if the principal is absent when it becomes due (e). 'If the acceptor have absconded from the place of payment, even without leaving funds

(a) *Antea*, p. 281.

(b) *Per* Lord Kenyon in *Brown v. M'Dermot*, 5 Esp. 265.

(c) *Bowes v. Howe*, 1813, 5 Taunt. 30. In this case the point was decided on an objection to the declaration, as not averring presentment, under the circumstances stated in the text. The objection had been repelled in the Court of King's Bench; but their judgment was reversed, on a writ of error, in the Exchequer Chamber. A similar decision was given in *Camidge v. Allenby*, 6 B. and Cr. 373, as to the recourse of a party on a note by a banker, which he had not presented,

having got the note after the banker failed, and as to which he had given no notice to his author. The same point was also ruled in *Rogers v. Langford*, 3 Tyrwh. 654. See also *postea*, p. 305.

(d) *Henderson v. Appleton*, reported in *Rogers v. Langford*, 3 Tyrwh. 660.

(e) This was decided in *Phillips v. Astling*, *antea*, 282, note (e); also in *Bank of England v. Newman*, 12 Mod. 241, *per* Holt, C. J., who held, "that a demand of a servant of the drawer, who used to pay money for him, was a good demand."

to meet it, the bill must notwithstanding be presented there for payment, under pain of losing recourse (a).'

It has been said, that, if the drawee of a bill or maker of a note is dead, presentment for payment ought to be made to his executors, or, though there are none, that the document should be presented at his house, and protested for non-payment (b). But where the bill or note is made payable at a particular place, presentment there, even in this case, is sufficient (c). The remarks which have been made on this subject as to presentment for acceptance, seem applicable to presentment for payment (d).

Drawee dead.

It is not necessary to present a bill for payment to the drawer before suing the indorser for recourse. Presentment to the drawee is in all cases sufficient (e).

Presentment to drawer.

It has been held, that a person bound for the acceptor of a bill by a separate guarantee, cannot be released for want of due presentment of the bill, if the acceptor has become bankrupt before it was due, so that the guarantor has not suffered loss (f). But the result will be different if the acceptors, or other parties from whom payment might have been exacted, did not become bankrupt for some time after the term of payment (g).

Case of guarantor.

Bills or notes should be presented for payment either by the

By whom such presentment made.

(a) *Sands v. Clark*, 10 Dec. 1849, 19 L. J. (C. P.) 84.

(b) *Chitty*, p. 246; *Molloy*, 2, 10, 34.

(c) *Philpott v. Bryant*, 3 C. and Pay. 244.

(d) *Antea*, p. 282.

(e) The contrary was once held in *Pardo v. Fuller*, Comyn's R. 579. But the doctrine as stated in the text was settled in *Heylin v. Adamson*, Burr. 669. In *Hamilton v. Mackrell*, Rep. Temp. Hardw. 332, and *Moore v. Paine*, id. 288, it was found, that, even in the case of a promissory-note, the holder did not require to prove a demand on the drawer or maker in order to charge the indorser. But this doctrine is erroneous; because the maker of a note is equivalent to the acceptor of a bill, and the first indorser is properly the drawer. Presentment to the maker of

the note is, therefore, undoubtedly necessary.

(f) This was the ground of decision in *Warrington v. Furber*, 8 East. 242, where it was found that guarantees for the acceptor of a bill were, under these circumstances, still bound to pay, and, having paid, were entitled to recover from their principals. The same doctrine was also employed in *Phillips v. Astling*, 2 Taunt. 206, although the actual circumstances of the case were different, and led to a different decision. A contrary decision was given by the Court of Session in *Alexander v. Scott*, 28 Nov. 1827, 6 Sh. and D. 151, F. C., in a case where there was not evidence of the bills having been protested. But *vide* the final opinions of the Lord Justice-Clerk and Ld. Glenlee in that case; and *postea*, § iv. Art. 9.

(g) *Phillips v. Astling*, note (g).

though marked only at the bottom of a note, has been printed before it is complete, presentment at that place is indispensable even to found a claim against the acceptor; because the specification of place is "to be considered as part of the note, having been made at the time" (a). But a different doctrine is held when such a memorandum was in writing, though written by the writer and granter of the note at the time of making it (b). When a bill has been drawn payable generally in London, and is accepted payable at a certain banker's in London, it has been held, even in an action against the acceptor, that this specification of place forms part of the contract, and that a presentment there must be proved (c). It has been already shown (d), that when a bill is drawn payable generally in London, or any other place, the drawee must, in his acceptance, specify a particular house for demanding payment

action by the drawer against the acceptor of a bill payable in London, he nonsuited the plaintiff because he could not prove that the bill had been presented in London. The Court, however, granted a rule nisi for a new trial, on the authority of *Selby v. Eden*, 11 Moore, 511 (3 Bingh. 611), where, in an action on a similar bill, it was held not necessary to aver in the declaration that it had been presented in London. On arguing the rule for setting aside the non-suit, it was made absolute, on the ground of the case of *Selby v. Eden* having settled that the Act 1 and 2 G. IV. c. 78, applied to bills made payable at a particular place by the act of the drawer, as well as to cases where they were accepted payable at such a place; 6 B. and Cr. 631. It may therefore be doubted whether the doctrine stated above can apply to claims against the acceptor of a bill, or granter of a note.

(a) Per Lord Ellenborough, in *Trecothick v. Edwin*, 1 Stark. 468, where the place of payment at the foot of the note, as well as the whole of it, except the sums, the parties' names, and the date, were printed. His Lordship held it necessary, under these circumstances,

to prove presentment at the place specified.

(b) *Williams v. Waring*, 10 B. and Cr. 2. This case is confirmed by *Masters v. Baretto*, 8 Nov. 1849, 19 L. J. (C. P.) 50, where it was stated to be the practice to treat all specifications occurring not in the body of the bill as mere memoranda of a place where payment might be asked. It was pointed out that *Trecothick v. Edwin*, n. (a) went on the speciality of the memorandum being printed.

(c) Per Lord Ellenborough, in *Garnett v. Woodcock*, 1 Stark. 475. In this case the bill had been presented at the place specified between 7 and 8 P.M. of the day that it became due, and the answer was, no orders. It was pleaded that there was no presentment within proper banking hours. But Lord Ellenborough held, that when a person attended and refused payment, the presentment was good, though it had been made at midnight. The necessity of presenting at the particular place was here taken for granted. The same doctrine was admitted in a similar case, *Hodge v. Fillis*, 3 Camp. 463.

(d) *Antea*, p. 220.

This implied obligation, therefore, of the drawee being contemplated in drawing such a bill, his specification of the place of payment will be as much in view of parties, and will form as essential a part of the contract, as if engrossed originally in the bill. But if the bill or note has been presented at the place specified, and payment refused, for instance, at a particular banking house, it is not necessary to notify non-payment to the acceptor or maker, since he is not drawer, but proper debtor, and was therefore bound to ascertain whether the bill or note was paid when presented (*a*). ‘Where a bill was drawn payable “at the bank office in Dundee,” and the drawee in accepting added no further specification, the notary presented at all the bank offices at Dundee, and on finding no funds protested for non-payment “where payable.” The Court held the protest good (*b*).’

In all these cases presentment at the place specified is still more necessary to give recourse against the drawer or indorsers, since they are not liable till the proper debtor is refused. In a question with them, it would probably be necessary to present the bill or note to the acceptor or granter at the specified place, though it should be merely noticed in a memorandum at the foot of the bill or note, as a place where payment might be made. This rule has at least been held applicable when the place of payment is specified only in the acceptance, as by accepting the bill “payable at a certain place” (*c*). The ground of it appears to be, that the drawee, by specifying a place for payment, indicated to the holder that he would obtain payment there, and thus rendered presentment there necessary, at least in a question with the drawer or indorsers, who are not liable unless the acceptor has failed to pay. This doctrine seems applicable though the place of payment should be indicated only by a memorandum annexed to the bill or note, and also when the drawee or granter intimates by his acceptance, or by a memo-

Questions of
Recourse.

—
To preserve
recourse,
presentment
at such place
necessary,

(*a*) *Per* Lord Ellenborough, in *Marce v. Pembertley*, 3 Camp. 261.

(*b*) *Gordon v. Stephen*, 28 Nov. 1845, D. 146.

(*c*) Bayley, 220. In *Ambrose v. Wood*, 2 Taunt. 61, being an action by the holder against the drawer

of a bill, which the declaration stated to have been accepted payable at a particular place, it was held to be fatal to the declaration that it did not likewise specially aver presentment at that place.

randum, that payment is to be made by a particular person, though not a party to the bill, as much as when he thus intimates that it is to be made in a particular place. It has been indeed suggested (a) that, as the 1 & 2 Geo. IV. c. 78, to be immediately noticed, enacted that acceptances, though they specify a particular place of payment, shall be accounted general acceptances to all intents and purposes, unless they declare that the bill is to be payable *if presented only in that place, and not otherwise*, therefore, in the case of such general acceptances, presentment to the acceptor anywhere would be sufficient, though the bill should not be presented at the specified place. But presentment as a ground for recourse is not merely co-relative with the acceptor's obligation; otherwise he would often not be bound to present, as the acceptor is often bound, as already stated, to find out him and make payment. The object of presentment as the foundation of a claim of recourse, is to ascertain that the acceptor has failed to make payment; and therefore, even when no place of payment is mentioned, it must, for this purpose, be made to the acceptor personally. So, when a place of payment is pointed out, though only in a memorandum, it is necessary, in order to ascertain that there will be no payment, to present the bill at the place specified, although the acceptor may be bound, as in any other general acceptance, without presentment there, or any presentment. This point has been accordingly thus settled (b).

and sufficient.

Presentment for payment at the place specified in the acceptance, or in a memorandum, is sufficient against the drawer or indorsers without going to the acceptor or granter personally; because, as he has thus pointed out the place where payment is to be asked, and where he is to have funds, his failure to pay there is a breach of engagement such as to authorize recourse against the other parties, as if presentment were made personally (c). As a sequel of this doctrine, it has been also found (d), that when a bill or note is payable at one or other of two places, presentment at or

(a) Chitty, 8th ed., p. 300.

(b) *Gibb v. Mather*, 2 Cr. and Jerv. 254.

(c) *Sanderson v. Judge*, 2 H. Bl. 509; also *Parker v. Gordon*, 7 East. 385-7, per Lord Ellenborough. The same doctrine was adopted, since the

1 & 2 G. IV. c. 78, by the Court of Common Pleas, in *De Bergareche v. Pillin*, 3 Bingh. 476, in *Hawkey v. Borwick*, 4 Bingh. 135, and in *Hawkey and Others v. Salter*, 4 Bingh. 715.

(d) *Beeching v. Gower*, per Gibbs, C. J., Holt, C. N. P. 313.

of them is sufficient to preserve recourse, when payment is refused there, on account of the failure of the house, though it would have been made at the other place, because the house there did not fail till a day or two afterwards. Nor does it make any difference though the actual place of presentment is more distant than the other. It has been also found, that if the banker whose house is specified as the place of payment is also holder of the bill or note, it is sufficient presentment by him to ascertain from his books whether the debtor has cash in his hands sufficient to meet it, the fact of his not having it being held to be a refusal of payment (a). It is implied, and has been held, in the cases already cited, as well as in others (b), that the doctrine now stated is applicable although the bill should be thus required to be presented for payment to a person not liable for it; for instance, to a banker at whose house the acceptor declares it payable, but who answers "no effects." It has been also judicially recognised as the practice of London, that when a bill is declared payable there at a bank, the presentment of it to the banker's clerk at the clearing house is sufficient, without presenting it at the bank (c).

It is not necessary, in order to found a claim against the acceptor of a bill or granter of a note, to present his bill or note for payment at a particular place, when it is only specified in a memorandum annexed to the bill or note; as such a memorandum is merely an intimation where payment may be had, and does not limit the debtor's obligation to pay by the condition of presentment at the place specified. This doctrine has been decided or assumed in England in every case where it has been the subject of discussion (d).

Effect of specifying place in memorandum.

(a) *Sanderson v. Judge*, 2 H. Bl. 509; also *Parker v. Gordon*, 7 East. 385-7, per Lord Ellenborough.

(b) *Stedman v. Gooch*, 1 Esp. 4.

(c) *Reynolds v. Chettle*, 2 Camp. 596; *Robson v. Bennett*, 2 Taunt. 388.

(d) It was taken for granted in *Sanderson v. Judge*, 2 H. Bl. 506, and *Callaghan v. Aylett*, 2 Camp. 550, although the questions at issue in those cases depended on different principles. In *Wild v. Rennard*, note to 1 Camp. 224, referred to afterwards by Bayley, J., in *Sanderson v. Bowes*, 14 East.

501, that judge decided that the presentment of a note at the place of payment, mentioned only in a memorandum annexed to it, did not require to be proved in an action against the maker. In *Price v. Mitchell*, 4 Camp. 200; Gibbs, C. J., gave the same decision in the case of a similar memorandum annexed to a note, holding that such a memorandum formed no condition of the contract, though a specification of the place of payment in the body of the note would have done so. A similar decision was given after-

Effect of specifying place in the acceptance.

But the Courts were not so unanimous in their opinions as to the effect of an acceptance "payable at a certain place," when no place was specified in the body of the bill; this subject having divided the Court of King's Bench and Common Pleas for many years, till it was settled by a solemn judgment of the House of Lords, and afterwards regulated by statute. It was always admitted, that when a bill is drawn without limitation of place, the holder is not bound to take an acceptance limited in this or any other respect. Further, when an acceptance was thus qualified, "payable at a certain place, and not elsewhere," this was held to be a clear restriction, which made it necessary to present the bill at the place specified, in order to charge the acceptor. But the question was, Whether an acceptance "payable at a certain place," without adding the words, "and not elsewhere," made the acceptor's liability depend on the presentment of the bill at that place? On the one hand, the judges of the Court of King's Bench held that such a note formed no condition restrictive of the acceptance, but was merely a memorandum intimating where payment might be had, and that the drawee's general obligation to pay in terms of the bill, independently of presentment at this place, remained entire (a). On the other hand, the Court of Common Pleas held, that although the holder of a bill drawn in general terms might refuse an accept-

wards by the same judge, in *Richards v. Lord Milsington*, Holt, C. N. P. 374. The same principle was also implied in *Exon v. Russell*, 4 M. and S. 405, *Hardy v. Woodroffe*, 2 Stark. 319, and *Williams v. Waring*, 10 B. and Cr. 2.

(a) This doctrine was held, and corresponding decisions given by the Court of King's Bench, in *Fenton v. Goundry*, 2 Camp. 656-7, 13 East. 459, where reference was made to a similar opinion said to have been expressed by Lord Mansfield in *Smith v. Lafontaine*; in *Lyon v. Sundius and Another*, 1 Camp. 423, where Lord Ellenborough held that such an acceptance was a mere memorandum; and in *Rowe v. Williams*, Holt, 366, where the Court, proceeding on the authority of the previous cases, would not hear an argument on the point. Lord Ellen-

borough, in this case, added that the strongest plea with him was the usage of merchants, who did not consider this as a restrictive acceptance, obliging the holder to present at the place specified, but merely as a convenient arrangement. In *Sebag v. Abithol*, 4 M. and S. 466, though the case was decided on other grounds, the Court of King's Bench again laid down the same doctrine regarding the effect of such an acceptance, and Lord Ellenborough considered it as an important circumstance, that, according to an opposite construction, it would be merely a conditional acceptance, and that the previous parties to the bill, if they gave their sanction to it, would thus be burdened with the proof of an additional fact, viz., the presentment of the bill at the place specified. Gibbs,

ance not conformable to it, yet if he took a restricted acceptance, he was bound by it; that the acceptance fixed the acceptor's contract as much as the words of a note did the engagement of the granter, and that the words accepted "payable at" a certain place, could have no other meaning than that the bill was to be payable *only* if presented there. It is further said to be the invariable practice to present bills thus accepted at the place where they are made payable (a).

These conflicting opinions were at last brought to issue in the House of Lords (b), in a case where their Lordships, after hearing the opinions of the judges on certain questions propounded to them, decided that, in the case of a bill accepted "payable at a certain place," without any other words, the holder must present the bill for payment at the place specified, before he can have an action even against the acceptor; and that such presentment, being a condition of the acceptance, must be specially averred and proved. This last point referred to a question of pleading, on which a majority of the judges had expressed an opinion, that such presentment need not be averred in the declaration, or proved; but that the defendant, besides tendering the money in Court, must prove that he had it at the place of payment, though the holder was not there to receive it, and that then his case would resolve into a claim of damages. *Rowe v. Young.*

C. J. of the Common Pleas, held the same opinion in *Head v. Sewell*, Holt, 363, where he laid it down, in the case of a similar acceptance, "that the acceptor was generally and universally liable."

(a) Chitty. The doctrines stated in the text were held by the Court of Common Pleas in *Callaghan v. Aylett*, 2 Camp. 549, 3 Taunt. 397, which was decided before the case of *Fenton v. Goundry*, in the Court of King's Bench; and in *Gammon v. Schmoll*, 5 Taunt. 344, 1 Marsh. 80. Reference was made in the first of these cases (in pleading) to *Parker v. Gordon*, 7 East. 385-7, where, in a question between the holder and the drawer of a bill which had been accepted payable at a certain banking-house, the Court of

King's Bench held that recourse was lost, because the bill had not been presented at the banking-house in proper banking hours. But this case appears to be solved by the distinction already stated between the holder's obligation to present to the acceptor, if *he can be found*, to the effect of preserving his recourse against the other parties, and the acceptor's obligation, which rests on different principles, to pay the holder, whether such presentment be made or not. Besides, Lord Ellenborough appears to have held, in that case, that if a presentment to the acceptor personally had been proved, it would have been sufficient.

(b) In *Rowe v. Young*, 1820, 2 Brod. and Bingh. 165.

1 & 2 Geo. IV.
c. 78.

Soon after this decision, the law was placed on a different footing by the 1 & 2 Geo. IV. c. 78, which, after narrating the point decided in the preceding case, and stating that, in consequence of a general understanding among merchants that such an acceptance is a general acceptance, inconvenience may be sustained if it should, on the contrary, be regarded, agreeably to this decision, as a qualified acceptance, therefore enacts, that from 1st August 1821, "if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill, payable at a banker's house or other place *only*, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill; and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place." This Act, though it refers to a decision in an English case, appears, from the generality of its terms, to be applicable to Scotland; and it must therefore be now considered as the rule in all cases regarding the form and effect of acceptances payable at a particular place, in so far as regards the acceptor's liability.

It has been decided since the date of this statute (*a*), that bills accepted, payable at a certain banking-house, are available against the acceptor, though not presented there at the term of payment, and though the bankers had funds more than sufficient to pay them till their failure, which did not occur for some time after the date of payment; 'and, since the statute (as before), presentment at a place specified in the acceptance, whether with or without the words, "and not elsewhere," is sufficient in questions both with the acceptor and with indorsers (*b*).' Further, it has been held (*c*), that the statute applies where the place of payment is inserted by the drawer, as well as when it is mentioned in the acceptance. 'It may be

(*a*) *Per* Abbott, C. J., in *Turner v. Hayden*, 1 R. and M. 215; affirmed by the whole Court of K. B., 4 B. and Cr. 1.

(*b*) *De Bergareche v. Pillin*, 1826. 3 Bing. 476.

(*c*) *Selby v. Eden, and Fayle v. Bird*, *antea*, 287, note (*d*).

mentioned here, as not irrelevant, that accepting a bill payable at a bank is of itself sufficient authority to the banker to apply the acceptor's funds in his hands to its payment (a).'

It has been decided in England, that, although a bill should be so accepted, that it is necessary to present it at a particular place, even in order to charge the acceptor, he cannot be released on the ground that it is not so presented at the term of payment, if he does not aver that the contents of the bill were thereby lost, though, if he did, the result would probably be different (b). But in the case of a foreign bill, if the value of the money in which it is payable has been altered after the date of payment, the acceptor will only be liable according to its value at that time (c). This rule relates to bills payable at a fixed term. With regard to bills or notes payable within a certain time after demand, it has been decided, that a demand is necessary to fix the term of payment, and that giving a note to a servant, without presenting it to the debtor personally, is not sufficient (d).

It has been already explained, that the statute does not change the rule as to the presentment required, in order to preserve recourse against the drawer and indorsers (e). 1st, It proceeds on a narrative only of a decision regarding the acceptor's liability under the acceptance referred to; and, therefore, the enacting words may be held to relate to that subject alone. 2dly, It has been shown (f), that the acceptance in question may be a general acceptance, such as is described in the statute, and yet that the holder may still be bound to present at the place specified, with a view to his recourse against the drawer or indorsers. An eminent writer on the law of bills (g) seems to be of this opinion, as he refers to the statute, only as affecting the claim against the acceptor (h). This view has been confirmed by a judgment of the Exchequer Chamber, on a writ of error, arising out of a bill of exceptions, in the case of a bill drawn payable in London, and accepted payable at Messrs J. and Co.'s, bankers, London, in which it was held, 1st, That, in all cases of a special acceptance by the drawee, there must be a special present-

Presentment at place so specified requisite to preserve recourse.

(a) *Kymer v. Lawrie*, 3 May 1847, 18 L. J. (Q. B.) 218.

(b) *Rhodes v. Gent*, 1821, 5 B. and Ald. 244; *Halstead v. Skelton*, 29 Jan. 1843, 13 L. J. (Ex.) 177.

(c) Pothier, No. 174.

(d) *The Duke of Norfolk v. Howard*, 2 Show. 235.

(e) *Antea*, 289-90.

(g) Bayley, 222-3.

(f) *Ibid.*

(h) *Ibid.*

ment, in order to charge the drawer, and that the 1 & 2 G. IV. c. 78 applies only to the case of an acceptor; and, *2dly*, That, while the drawer drew the bill, payable "in London," the acceptance did not alter the obligation so far as he was concerned, but made it more specific (*a*).

(3.) *Time of Presentment.*

At what time
presentment
for payment
to be made.

The time when a bill or note should be presented for payment has been already discussed in considering the time of payment (*b*), and that both where days of grace are, and where they are not allowed (*c*). Presentment for payment in the former of these cases, before the last day of grace, is a nullity (*d*). This is settled in England. In Scotland, the Court decided (*e*), that a protest for non-payment made on the day of payment was irregular, while they were of opinion that it would have been good if taken after the day of payment, though before expiration of the days of grace. This opinion, however, seems contrary to principle, since it does not appear competent to protest for non-payment till the debtor is bound to make payment, which is not till the last day of grace (*f*). No such protest has been ever sustained; and, if the case were now to occur, it would be rejected as it has been in England. In case of refusal, a bill may be held dishonoured, and notice of dishonour given early in the day on which the bill is due (*g*). Presentment after expiration of the days of grace, though only the day after, has been decided to be irregular, and the holder has been therefore found in such cases, to have lost his recourse against the previous parties (

(*a*) *Gibb v. Mather*, 2 Cr. and Jerv. 254; 8 Bingh. 214; 2 Tyrwh. 189; 6 M. and Pay. 387, S. C.

(*b*) *Antea*, 376 *et seq.*

(*c*) *Ibid.*

(*d*) *Wiffen v. Roberts*, 1 Esp. 261-2, per Lord Kenyon, C. J.

(*e*) *Charles v. Skirving*, 2 July 1788, Morr. 1614.

(*f*) *Vide* Forbes, 91-2. Menzies (p. 365) adopts the opinion of the Court in *Charles v. Skirving*, note (*e*). It would be unsafe for any one to act on this opinion, as it is not supported by

other authorities, and is certainly opposed to the decision in *Wiffen Roberts*.

(*g*) *Clowes v. —*, 2 Dans. Lloyd, 212.

(*h*) *Ramsay v. Hogg*, 6 July 17 Morr. 1565; Elchies, No. 31, v. Bi Jameson v. Gillespie, Elchies, No. v. Bill; *Cruickshanks v. Mitchell*, 1 29 June 1749, Morr. 1576, Elchies No. 49, v. Bill; *Hart v. Glassford*, June 1755, M. 1580; *Tod v. Maxwe* 21 July 1758, M. 1583; *Fairholms The Sun Fire Office*, 23 June 176.

It has been also decided (*a*), that, although a party should get a bill so near the term of payment, and at such a distance from the place of payment, that it cannot, by any diligence, be presented in time, he is not therefore entitled to consider it as a bill payable at sight or on demand (when it would be sufficient not to suffer undue delay), but must use the utmost possible despatch. It will not even excuse his delay, that the bankers to whom he has sent it for presentment present it sooner than they were bound to do, although less time should thus elapse on the whole than if each party had taken precisely the time to which he was entitled (*b*). He cannot derive benefit, in such a case, from the extraordinary diligence of other parties.

The presentment of bills or notes, payable on demand, for payment, is regulated generally by the rule already stated regarding the presentment of bills or notes payable at or after sight for acceptance, viz., that it must be made within a reasonable time after the holder receives it, and without undue delay. 'What is a reasonable time depends always on circumstances; for, if a bill on demand is granted, as it sometimes is, as a continuing security, it need not be presented till the holder pleases. In one case, a bill on demand was held to be duly negotiated though not presented for six months (*c*); and, in another case, a note payable one day after date was allowed to be sued on two years after its delivery (*d*).' The rule as to negotiation in reasonable time may be applicable, 1st, When the bill or note is payable in the same place where the holder has received it; and, 2dly, When it must be transmitted for payment to a different place.

When bills or notes on demand to be presented.

1. As to the first of these cases, it appears to be now settled in England, on principles also applicable in Scotland, that a person receiving a bill, note, or banker's check payable on demand, in the place where it is to be presented, for instance in London, has the whole day after receiving it for presentment, or, if it is payable at a banking-house, the whole banking hours of the next day. There was once a great fluctuation of opinions on this subject. For ex-

Case of such bill or note payable where holder receives it.

M. 1588; *British Linen Company v. Hepburn and Co.*, 19 May 1807, 1 Bell, 411, note 6.

(*c*) *Leith Bank v. Walker's Trs.*, 22 Jan. 1836, 14 S. 332.

(*d*) *Jamieson v. Jamieson*, 12 Feb.

(*a*) *Anderton v. Beck*, 16 East. 248. 1812, H. 69.

(*b*) Note (*a*).

ample, it has been held no undue delay to keep a check or bill, without presenting it, three, or even four or five days (a); while, on the other hand, the delay of two days (b) has been accounted too long, or even a delay till next day (c), and, in one case (d), for an hour. From these variations in the opinions of juries, the expediency of leaving the time of presentment to them has been much doubted; and it has been laid down, that this is a question of law to be decided by the Court, leaving it to the jury to find the facts from which the legal inference is to be drawn, and also consulting them in questions of mercantile usage or expediency (e). 'This matter appears now to have been so settled (f); and, perhaps, the conclusion attained respecting it, is that which ought also to obtain as to the proper time of presentment for acceptance (g).' At all events, the doctrine now adopted seems to be, that the holder of such a bill or note is not bound to present it instantly to the neglect of all his other business, but must do so as soon as is possible, consistently with the ordinary course of business. It has been said, for instance, that "it was unreasonable to suppose that a tradesman should be compelled to run about the town with half a dozen drafts from Charing-Cross to Lombard Street, and other

(a) *Vide Phillips v. Phillips*, 2 Freem. 247; *Crawley v. Crowther*, *id.* 257.

(b) So held by the jury in *Manwaring v. Harrison*, 1 Str. 508.

(c) So held by the jury twice (against the direction of the Court), in *Appleton v. Sweetapple*, Bayley, 239, where a bill payable on demand, which the plaintiff had got about one P.M., was not presented for payment till next morning. The case is also reported, 3 Dougl. 137, with a small variation of circumstances, but not such as to affect the point at issue. The same thing was found in *Hankey v. Trotman*, 1 Blackst. 1, with regard to a check on a banker which a plaintiff had got about noon, and, though he got it marked for acceptance that night, waited for payment till next morning, when the banker had failed. The same result also followed, against

the opinion of the Court, in *Medcalf v. Hall*, 3 Dougl. 113.

(d) Lord Mansfield, in *Tindal v. Brown*, 1 T. R. 168-9, states, that, in a previous case, *Metcalfe v. Douglas*, the jury "struggled so hard, in spite of the opinion of the Court, to narrow the rule, that they held you must, in certain cases, demand payment of a banker's draft within an hour."

In an early case, *Mead v. Caswell*, 9 Mod. R. 60, a rule similar to the more recent doctrine was adopted; it being held that the indorser of a note, who had given it in payment of a debt, was not released by the circumstance of the holder's servant not presenting it till Monday morning, though he had got it on Saturday.

(e) Chitty, p. 262.

(f) *Per* Maule, in *Rowe v. Tipper* (C. P. 1853), 13 C. B. 256.

(g) *Antea*, 278.

places, on the same day." On this principle, Lord Mansfield, in the case alluded to, directed the jury to allow twenty-four hours for presenting a check on a banker; and, though they thought otherwise, and found for the defendant, the Court granted a new trial (*a*). In other cases it has been held, that a person receiving a bill or note is allowed till next morning to present it for payment (*b*). But, more recently, it has been decided that such a bill or note, made payable at a banker's, may be legally presented for payment at any time within banking hours of the day after it was received (*c*). The

(*a*) *Per* Lord Mansfield, C. J., in *Tindal v. Brown*, for whose opinion *vide* Beawes, No. 229, as corrected by Kyd, p. 45; and also in *Medcalf v. Hall*, 3 Douglas, 113, where a similar opinion of his Lordship, though negatived by the verdicts of two juries, was sanctioned by the rest of the Court.

(*b*) In *Ward v. Evans*, 2 Lord Raym. 928, it was held sufficient negotiation of a note to demand payment the morning after receiving it, though the debtors remained solvent all the previous day, and had stopped when it was presented. A similar rule was held, under nearly similar circumstances, in *Moore v. Warren*, and *Holme v. Barry*, 1 Str. 415; *Turner v. Mead*, *id.* 416; and *Fletcher v. Sandys*, 2 Str. 1248. In *East India Company v. Chitty*, 2 Str. 1175, where a goldsmith's note, which the plaintiff had got at half-past eleven A.M., was not presented till next day after two P.M., at which hour the goldsmith stopped payment, it was held that it ought to have been presented in the afternoon of the first day, or, at all events, in the morning of the second day, and therefore the defendants had a verdict. A similar verdict was given, and was affirmed by the Court, in *Hankey v. Trotman*, 1 H. Bl. 1, where a banker, having taken a draft on another banker in payment of a bill, did not ask payment that night, but only got it marked for acceptance, and the banker had stopped before next morn-

ing. In *Hoar v. Da Costa*, 2 Str. 910, where the plaintiff, having got a note at twelve, carried it to the debtor with other notes at ten next morning, and left them, as usual, to call for payment at eleven, when it was asked, as well as afterwards at two, but refused (the bankers having paid small notes for two hours after two o'clock, and stopped altogether at four), the jury held that there was no laches, and found for the plaintiff.

(*c*) In *Robson v. Bennett*, 2 Taunt. 388, which was the case of a banker's check, it was taken for granted that the check might be presented for payment at any time of the day after receiving it; and, accordingly, it was held to be duly negotiated, when the plaintiffs' bankers, whom the plaintiffs employed to get payment, on presenting it the first day, took an acceptance payable the next day at the clearing house, and afterwards waited for payment the whole of next day at the clearing house before giving notice. Presentment for payment at the clearing house, which the acceptance pointed out as the place of payment, was held to be the same with presentment at the bank; and the whole proceedings were proved to be conformable to the usage of London bankers in their dealings with each other. In *Pocklington v. Silvester*, Chitty, 419, which was also the case of a banker's check, the plaintiff having got the check at eleven in the morning of 16th November, but not

same decision has been given with regard to the presentment of banker's check (*a*); and it has been held, that any rule which may exist between bankers as to presenting checks for payment at the clearing house the day on which they are received, does not alter the rule, that the holder of a check has, in a question with the granter, a day after he receives it to present it for payment. It has been also held, that a London banker receiving a check from his correspondent in the country to be presented for payment, is not bound so to present it till the day after he receives it. This decision was given on general grounds, without reference to local usage (*b*).

It is said, that when a person who makes his livelihood by dealing in bills or notes payable on demand, gives such bills or notes as cash, there can be no fixed rule to determine what delay in presenting them for payment shall be accounted unreasonable (*c*). It must be decided from the circumstances of the case, whether his chief object was to put them into circulation, as with ordinary bankers' notes, in which case there seems to be no definite time for presenting them, or whether they are mere drafts or bills on third parties, issued for the purpose of paying a single debt. When bankers receive bills or notes payable on demand, they must observe the rules of presentment, like other parties (*d*). In the Scotch case 'already mentioned (*e*),' where a promissory-note, payable

having presented it till five P.M. of the 17th, while the bankers had stopped at four P.M., the jury, at first, contrary to the direction of Gibbs, C. J., found for the defendant; but a second jury found for the plaintiff, Burrough, J., having directed them that it was now a fixed rule to allow the whole of the second day to present for payment.

(*a*) *Boddington v. Schlenker*, 3 Nev. and Man. 540; *Moule v. Brown*, 25 Jan. 1838, 7 L. J. (C. P.) 111.

(*b*) *Rickford v. Ridge*, 2 Camp. 539, *per* Lord Ellenborough. The same doctrine was held in *Williams v. Smith*, 2 B. and A. 496, where certain bank notes having been sent from the country, by a person who received them, to his London correspondent to get payment, the latter was found to have negotiated them properly by pre-

senting them the day after they arrived, although payment, then refused on account of the granter's intervening failure, would have been made on the day of arrival. In *James v. Holditch*, 8 D. and Ryl. 40, where a servant received country bank notes for his master on Friday, and paid them to him on settling accounts after business hours on Saturday evening, and they were not presented till Monday morning, while the bank had stopped on the Saturday, recourse was allowed against the giver of the notes. See also *antea*, p. 119.

(*c*) Bayley, 236.

(*d*) Bayley, 236, etc. This appears to be the true scope of the rule laid down by this author, although it is somewhat differently expressed.

(*e*) *Antea*, p. 297, note (*c*).

able on demand, was held to be granted as a loan, and not as a remittance, it was found to have been duly negotiated, though not presented or protested for more than five months after its date (a).

2. When a bill or note payable on demand is received in a different place from that in which it is payable, it must be transmitted to the latter place for payment without undue delay. It is said (b) to have been held, at one time, that such a bill or note must be sent by the first post after it was received, although the post should go out the same day. But it has been decided in the latest cases, that it is sufficient to send it the day after receiving it (c). If it should not be safe, however, to send the notes entire by one post; for instance, in the case of notes payable to the bearer, of which it becomes necessary to send halves by a conveyance which does not arrive till after the second day's post, the transmission of the remaining halves may be made by the second day's post, since their earlier arrival would be of no advantage (d). It has been decided, that a party who had taken notes of a bank on 10th December as payment of a debt, the bank having stopped payment that morning, though neither he nor his debtor knew it, and who neither circulated nor presented them for payment, but on 17th December offered them back to his debtor, had failed to negotiate them properly, and lost his recourse for the debt (e).

Bill or note on demand, payable in a different place.

Such notes may be transmitted by other safe conveyances besides the post, although, unless in case of necessity, the remitter must take the risk of those conveyances arriving later than the post, which is the only accredited conveyance. The holder will lose

Transmission of such bill or note.

(a) *Leith Banking Co. v. Walker's Trustees*, 22 Jan. 1836, 14 S. D. B. 332, F. C.

(b) Bayley, 237-8.

(c) This was held in *Rickford v. Ridge*, 2 Camp. 539 (cited also *antea*, p. 119), where the plaintiffs having received a check on a London bank at mid-day, on 13th June, did not send it till the next morning, by a coach which set off at 8 A.M., although the post set off at 6 P.M. on the day that they received it. In *Williams v. Smith*, already cited, *antea*, 300, note (b), it was held, that sufficient

despatch had been used by sending off the notes in question (which had been received on Friday), after cutting them into halves, one-half in a packet by a coach which set off on Saturday evening, and another by Sunday's post, although the packet did not reach London till Monday, some time after the Sunday's post; it being held, that as the notes were payable to the bearer, such a transmission of them in halves was necessary, as a precaution.

(d) *Williams v. Smith*, note (c).

(e) *Camidge v. Allenby*, 6 B. and Cr. 373.

his recourse by delaying to transmit his bill or note till the second day after receiving it, although he should then send it by a conveyance which arrives only an hour later than the post of the preceding day (*a*). Courts of law will not suffer the holder to escape from his own neglect by inquiry into such minute circumstances.

Circulation of
Checks.

It would seem that, though a banker's check payable on demand may be kept in circulation for some time, according to mercantile usage, and, in that case, will not require to be presented till within a reasonable time after the last holder receives it, such circulation cannot be kept up for an unlimited time, so as to render all the previous parties liable, on the drawee's failure, at whatever time the check may be presented (*b*). It must be determined from the circumstances of the case, what extent of circulation is allowable.

Hour for
presentment.

As to the time of day when a bill, note, or check must be presented for payment, the rule is the same as in presentment for acceptance, that it must be made at a seasonable hour. It has been laid down, that if, by the known custom of the place where a bill or note is payable, such documents can only be presented there within certain hours, presentment beyond those hours will be deemed unseasonable (*c*). When the bill or note is to be presented to a person in any particular business, for instance, to a banker, presentment will not be good, beyond the hours usual for such persons; it being held, that the creditor, by engaging to present to such a person, binds himself to present during the hours so fixed (*d*). 'It is for the jury to say what are business hours, and in fixing them they are to have reference rather to the general hours of business at the

(*a*) *Beeching v. Gower*, Holt, 315, *per* Gibbs, C. J., who held, that the plaintiffs were perhaps bound to have sent off the document in question (a banker's check) by the post of the 5th, on which day they received it, but, at all events, by that of the 6th. The first of these alternatives is contrary to the doctrine now established by *Williams v. Smith*, *antea*, 300, note (*b*).

(*b*) This doctrine is taken for granted in *Boehm v. Stirling*, 7 T. R. 430, where it is laid down, that the rule regarding the necessity of presenting within a reasonable time, bills or notes pay-

able on demand, is also applicable to bankers' checks.

(*c*) Bayley, 224.

(*d*) This rule was laid down in *Parker v. Gordon*, 7 East. 385. In *Elford v. Teed*, 1 M. and S. 28, being an action against the drawer by the indorsee of a bill, payable at a banking-house, which had been presented there between half-past six and seven P.M. by a clerk, who found the bank shut, and who, on going to a private door, was answered by a female servant, "no orders," Lord Ellenborough first, and afterwards the whole Court, laid down

place, rather than to the custom of any particular trade (a). Presentment to a banker or any other person cannot be considered unseasonable, at whatever hour, if a person is stationed at the bank or other place of presentment, who gives an answer refusing to pay (b). In a case, however (c), where a bill was presented for payment at a bank in the morning, and refused for want of effects, and afterwards presented at six o'clock in the evening (effects being lodged in the meantime), and again refused, the bankers not being obliged to pay after five o'clock, it was decided that they were not liable in damages to the drawer, their customer, for the refusal. They had paid the bill, as well as the expense of noting, next day. If the drawee or debtor is not a banker, but a private trader, a presentment at his house, even late in the evening, for instance at 8 P.M., will be sufficient, although it will not be valid if made during the usual hours of rest (d). 'But presentment at a

the same rule as in *Parker v. Gordon*, which they held to be a precedent for this case. But, as the plaintiff alleged another presentment during banking hours, he was allowed a new trial to prove it, on payment of previous expenses.

(a) *Neilson v. Leighton*, 7 Feb. 1843, 5 D. 513.

(b) In *Garnett v. Woodcock*, 1 Stark. 475, 6 M. and S. 44, a bill which was accepted, payable at a certain banking-house, having been presented there betwixt 7 and 8 P.M., when a boy answered, "no orders," Lord Ellenborough held, that as an answer had been given by a person who must be presumed to have been stationed there for the purpose, the presentment was good, though it had been made at midnight. The same doctrine was laid down by his Lordship, and by Bayley, J., in *Henry v. Lee*, 2 Chitty's Rep. 125. The distinction between the case first mentioned and *Elford v. Teed*, note 1, appears to be, that in the latter case the bank was shut, and no answer was made except by a female servant who opened the private door, and who could not, therefore, be

presumed to have been stationed there to give an answer.

(c) *Whitaker v. Bank of England*, 5 Tyrwh. 268.

(d) *Barclay v. Bailey*, 2 Camp. 527, per Lord Ellenborough, who sustained a presentment made under the circumstances stated in the text, at 8 P.M., although the drawee had a person stationed at his residence from 9 A.M. to 4 P.M. of that day, who would have paid the bill then, if it had been presented. A similar decision was given in *Triggs v. Newsham*, 1 C. and Pay. 631, 10 Moore, 249, and in *Wilkins v. Jadis*, 2 M. and Malk. 41, 2 B. and Ad. 188, where a bill was presented at the place of payment mentioned in the acceptance between 7 and 8 P.M., but the door was shut, and though the presenter called, no one answered. In *Morgan v. Davison*, 1 Stark. 114, where the bill in question being made payable in London, at the house of a company who were not bankers, had been presented at their counting-house between 6 and 7 P.M., when there was only a girl to take care of it, Lord Ellenborough held the presentment to be good, as this was an hour when the

person's shop at such a late hour (8 P.M.) after it is shut, and after the time when persons in his trade usually shut, even though it may be somewhat before the general hour for shop-shutting in the district, is not timeous presentment (a).'

Bill not to be left with acceptor.

A bill or note, when presented for payment, cannot be left in the debtor's hands as when presented for acceptance; and, if it is so left, presentment cannot be considered as made till payment is demanded (b). It seems to have been held, in two early cases (c), that leaving notes with the debtor in the morning was sufficient presentment, though payment was not called for till the evening, when they had failed. But these decisions were founded on local custom, and do not interfere with the general rule.

Questions with bankers and agents.

If bankers at whose house a bill is payable at first refuse it, when presented for payment, for want of effects, but afterwards, on getting a remittance, send to take it up, when they learn that the holders have sent it back, and, in the meantime, the same bankers receive new orders from their correspondents not to pay it, it has been found, that they are entitled, on this ground, to refuse payment, as the holders of the bill did not desire them, when offered payment, to keep the money for their use, but virtually relinquished their claim over it (d). But a marking by bankers on a bill, importing that it shall be paid next day at the clearing house, is absolutely binding on them (e). If an agent, who has got money to pay a bill, offers the amount on getting it up, which, however, is then impossible, as it is mislaid, and, in the meantime, the agent

plaintiff might expect to find the party in his counting-house. The plaintiff, who was suing the drawer for recourse, had a verdict.

(a) *Neilson v. Leighton*, 9 Feb. 1844, 6 D. 622. Where the holder is found liable in damages for presenting at a wrong hour, he is entitled to recourse against the banker by whose hands he presented: *Houldsworth v. British Linen Co.*, 19 Dec. 1850, 13 D. 376; 2 Bell's Ap. 30.

(b) In *Hayward v. Bank of England*, 1 Str. 550, where the plaintiff had paid in to the defendants a banker's note, which their runner left with the banker in the morning, when

the banker cancelled it, but did not ask payment till the afternoon, by which time the banker had stopped payment, it was held that the defendants were liable to the plaintiffs for the value of the note in the morning, which was accordingly rated at half its amount, as the banker paid 10s. per pound. The defendant's clerk had taken a new note for the amount from the banker in the afternoon, but this was held to be irregular.

(c) *Turner v. Mead*, 1 Str. 416; *Hoar v. Da Costa*, 2 Str. 910.

(d) *Stewart v. Fry*, Holt, 372, per Gibbs, C. J., 1 Moore, 74.

(e) *Robson v. Bennett*, 2 Taunt. 388.

fails with the money in his hands, the principal will still be liable for the debt, because there has been nothing but a tender of payment, which does not extinguish it (*a*). If the principal wished to be secure, he should have ordered consignment.

It will be no excuse for want of due presentment, whether for acceptance or payment, that the drawee or maker is dead (*b*), or has been put in prison (*c*), or has failed before the term of payment (*d*). The bill or note must, even in these cases, be strictly negotiated; and it would be inconsistent with the security of bill transactions to disturb this rule, while it would open a wide source of litigation, to allow an inquiry in each case, whether, through the drawee's insolvency or otherwise, the previous parties have not suffered loss from want of due negotiation. The doctrine now stated has been accordingly long settled both in Scotland and England (*e*).

When want of
timeous
presentment
not excused.

(*a*) *Dent v. Dunn*, 3 Camp. 396, per Lord Ellenborough.

(*b*) Pothier, No. 246.

(*c*) Per Lord Alvanley, in *Haynes v. Birks*, 3 Bos. and Pull. 599, who, in considering a question of notice, said that he would throw altogether out of view the circumstance of the holder being informed, when the bill was presented last for payment, that the acceptor was in prison.

(*d*) See cases cited in the following note, and also Chap. IX.

(*e*) *Ferguson and Co. v. Belsh*, 17 June 1803, Morr. App. v. Bill, 16. In *Calder v. Lyall*, 22 Dec. 1808, F. C., it was found to be no answer to the plea of undue negotiation (arising, in this case, from want of notice of dishonour, which, however, with reference to the point now in question, depends on the same principle with want of presentment), that the acceptor had failed before the bill became due.

The point has been also quite settled in England. In *Russell v. Langstaff*, 2 Dougl. 514, it was stated, that Lord Mansfield had often ruled, that the

acceptor's bankruptcy did not excuse want of notice, which depends on the same principles on this point with want of presentment. The same principle was recognised in *Bickerdike v. Bolman*, 1 T. R. 408; and also in *Warrington v. Furber*, 8 East. 242, although it was held there not to be applicable, as the question did not relate to the negotiation necessary to preserve recourse against a party to a bill, but to the means for preserving recourse against a person bound by a separate guarantee. (On this alleged exception to its application, vide *Alexander v. Scott*, 28 Nov. 1827, 6 S. 151, and *postea*, Sect. IV. Art. 9.) The objection of the acceptor's bankruptcy was also held to be no answer to the plea of want of presentment and notice, in *Nicholson v. Gouthit*, 2 H. Bl. 612, or to the plea of want of notice in *Whitfield v. Savage*, 2 Bos. and Pull. 277, though the bankruptcy was known in both cases to the party claiming notice before the term of payment. A similar objection was disregarded by Lord Ellenborough, in *Thackeray v. Blackett*, 3 Camp. 154.

Presentment
before
maturity

When a bill was presented the day before it became due to ~~the~~ drawees, who said that they had then no effects of the drawer, ~~but~~ that he would probably provide them before next day, when it ~~fell~~ due, it was held that it should have been presented on that ~~day~~; and it was found to be no excuse for non-presentment, in an ~~action~~ against the drawer, that he had, on that day, expressed a hope to the holder that the bill would be paid, and said that he ~~would~~ endeavour to provide effects, and see him again. The bill, ~~not~~ having been presented again till the day after it became due, ~~the~~ plaintiff was non-suited in an action against the drawer (a).

SECTION II.

OF PROTEST FOR NON-ACCEPTANCE, AND FOR NON-PAYMENT—

When protest
necessary.

If the drawee of a bill refuses to accept it when presented to him for acceptance, or the drawee of a bill or maker of a note refuses to pay it when presented for payment, the holder must ~~take~~ what is called a protest as written evidence of his having made ~~due~~ presentment, and of the debtor's refusal. This is not necessary to make good the holder's claim against the drawee or maker of a ~~bill~~ or note; for, though a protest is required in Scotland by statute ^(b) to warrant summary diligence even against the drawee or ~~maker~~, this party, being proper debtor, may be sued by an ordinary ~~action~~ without a protest. 'Indeed, the chief use of the protest is now ~~as~~ a warrant for summary diligence. It was formerly required in ~~all~~ cases to preserve the holder's recourse against the drawer and ~~indorsers~~ (c); but in the case of promissory-notes and inland bills ~~the~~ Mercantile Amendment Act has made it sufficient to prove present~~ment~~ ^{t-}

In *Eisdale v. Sewerby*, 11 East. 114, Lord Ellenborough says, "It is too late now to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment, or of notice of the dishonour." This *dictum* may be held to express the law on the subject, as it is now established both in Scotland and in England. The Lord Chancellor, in *ex parte Wil-*

son, 11 Ves. 412, and in *Boulton v. Stubbs*, 18 Ves. 21, refers to it as the settled rule.

(a) *Prideaux v. Collier*, 2 Stark. 57; Chitty, p. 247.

(b) 1681, c. 20; 1696, c. 36.

(c) Stair, 1, 11, 7; 1 Bell's Com. 414; 12 Geo. III. c. 72, § 41; *Ferguson v. Belch*, 15 June 1803, M. Ap. Bill, 16.

ment and dishonour, to the effect of preserving such recourse, by other competent evidence, either written or parole (*a*). As, however, the holder is seldom willing to lose the power of doing summary diligence, and as in foreign bills the protest is still required, both for that purpose and to preserve recourse, its use is as frequent as ever.

‘In England it is not now, and does not clearly seem to have ever been, necessary for any purpose, to protest for non-acceptance (*b*) or non-payment (*c*) of inland bills or promissory-notes. There was a statutory power to protest inland bills, as well for non-acceptance (*d*) as non-payment (*e*); but the power was held a mere additional remedy, and was seldom used (*f*). With regard to foreign bills, a protest is required to preserve recourse in England (*g*) as in Scotland. In both countries, the necessity for protesting foreign bills seems to have arisen from custom. The law of the United States is the same as that of England (*h*). In most other foreign countries, it is believed that a protest is indispensable (*i*); and whenever any party requires to be sued abroad, it would accordingly be advisable, whatever may be the nature of the bill, to take a protest (*k*).’

It has been already shown (*l*), that no bills but those payable at or after sight need to be presented for acceptance. Bills payable after date, or at some other fixed term, may be presented for payment only; and, if this is refused, it will then be sufficient to protest for non-payment (*m*). But if the holder presents separately for acceptance, and it is refused, there must be a separate protest for non-

For non-acceptance or non-payment?

(*a*) 19 & 20 Vict. c. 60, § 13.

(*b*) *Windle v. Andrews*, 1819, 2 Bar. and Ald. 696.

(*c*) *Brough v. Parkins*, 1712, 2. Ld. Raym. 992.

(*d*) 3 & 4 Anne, c. 9, § 4.

(*e*) 9 & 10 Wil. III. c. 17.

(*f*) Chitty, pp. 227, 318.

(*g*) *Rogers v. Stevens*, 1788, 2 T. R. 713; *Gale v. Walsh*, 1793, 5 T. R. 239; *Orr v. Maginnis*, 1806, 7 East. 358.

(*h*) Story, §§ 275, 281.

(*i*) 2 Pardessus, No. 421; Code de Commerce, Art. 173; Nouguiet, § 726

et seq.; Allgemeine Deutsche Wechselordnung, Art. 41.

(*k*) See Ellenborough's opinion in *Legge v. Thorpe*, 1810, 12 East. 171.

(*l*) *Antea*, p. 277.

(*m*) In *Jameson v. Gillespie*, 28 June 1749, M. 1494 and 1579, where a bill, instead of being presented separately for acceptance, was presented only on the last day of grace, and protested once for all for non-payment, the Court, after taking the opinion of merchants both in London and Edinburgh, decided that this was sufficient.

acceptance (*a*). On the other hand, it has been held in England (*b*) (and the doctrine appears correct), that if a bill has been protested for non-acceptance, and its dishonour duly notified, it is not necessary either to present it again for payment, and protest separately for non-payment, or to give separate notice of non-payment.

How form of protest regulated.

The form and manner of taking a protest must be regulated by the law or usage of the country where the bill or note is to be presented for acceptance or payment (*c*). In Scotland, it must be taken by a notary-public before two witnesses, and is then evidenced by an instrument written out and signed by the notary, which is called an instrument of protest. The form of this instrument, with reference both to non-acceptance and non-payment, is given in the Appendix.

Place where protest to be taken.

Certain steps are necessary, before the notary is entitled to extend the instrument of protest. When the drawee or maker refuses acceptance, or payment, as the case may be, the creditor in the bill or note, or, if he be sick or absent, some third party (*d*), must apply to a notary, who should immediately present it again, and demand acceptance or payment. This is the rule, when the bill is not payable at a different place from the drawee's address, in which case it should be presented by the notary according to his address. But, when it is payable elsewhere, and acceptance has been refused, it is necessary only to protest it 'for non-payment,' without further presentment, at the place of payment, unless it be paid to the holder, on the day when it would have become payable, had it been duly accepted (*e*).

(*a*) In *Blessard v. Hirst*, 5 Burr. 2670, *Goodal v. Dolley*, 1 T. R. 712, and *Koscoe v. Hardy*, 2 Camp. 459, 12 East. 434, this doctrine was held in England, in the case of inland bills, with regard to the necessity of giving notice of non-acceptance, when the bills were presented for acceptance, and it was refused. See also *Whitehead v. Walker*, 31 Jan. 1842, 2 M. and W. 506.

(*b*) In *Price v. Dardell*, cited by Chitty, 467, note 6, Lord Kenyon is said to have expressed an opinion, that notice of second dishonour was unnecessary. In *De la Torre v. Barclay*,

1 Stark. Part 2, 7, where the question turned in some measure on the necessity of a protest for non-payment of two foreign bills, after acceptance had been refused, Lord Ellenborough held, that "a second protest was perfectly gratuitous and unnecessary."

(*c*) Pothier, No. 155; Nonguier, § 765; Story, § 138; Chitty, p. 313; *Elder v. Young*, 15 Nov. 1854, 17 D. 56.

(*d*) Molloy, 2, 10, 17; see p. 309.

(*e*) 2 & 3 Wil. IV. c. 98. This Act was passed to remove doubts raised by *Mitchell v. Baring*, K. B., 1830, 10 B. and Cr. 4.

It has been said (*a*), that when a bill is drawn abroad, payable in London, but addressed to a party at some other place, it may be protested for non-acceptance, either in London, or at the drawee's place of residence. 'But as the presentment for acceptance must be at the latter place (*ante*, p. 283), it would appear preferable to make the protest for non-acceptance there also.' The protest for non-payment must be taken in London. A protest taken, when the drawee cannot be found, and no place of payment is specified, at the head burgh of the county in which he last resided, has been held ineffectual (*b*). Perhaps it should be taken at his last residence (*c*).

Any person having the custody of a bill may get it protested for non-acceptance (*d*); but it is only the creditor, or some person authorized by him, who can get a protest taken for non-payment, as such a protest would be obviated by the debtor offering to make payment, which supposes that there is a party capable of giving a discharge (*e*).

At whose instance?

The rules, also, which have been laid down as to the person to whom and the place where presentment should be made, in the several cases of the bill or note being drawn on or granted by a company or an individual, or of the drawee or granter being dead or absent, are applicable in general as to the person against whom and the place where a protest should be taken (*f*). If two persons of the same name and designation live in the same place, and the possessor of the bill does not, therefore, know to which of them it is directed, but both refuse to accept, he should protest against both (*g*).

Against whom?

The notary, being truly a witness, ought not to have an interest in the bill or note; and therefore (*h*) it has been held improper for the managing partner of a bank to act as notary in protesting their bills, though it is said that a mere stockholder whose interest is very remote may do so. The Court has also decided (*i*) that a protest is

Who may act as notary?

(*a*) Marius, 107-8.

(*f*) *Antea*, 275 *et seq.*

(*b*) *Glendinning's Creditors v. Montgomery*, 14 June 1745, Morr. 1449-51.

(*g*) *Scarlett*, C. 11, R. 14.

(*c*) *Vide case* in the preceding note, Morr. 1451, where this appears to be suggested; and *ante*, p. 282, note (*b*).

(*h*) *Farries v. Smith*, 9 June 1813, F. C. There was no express decision in this case, regarding the legality of the protest, as recourse was held to be lost for want of due notice of dishonour.

(*d*) *Forbes*, 89. *Per Justice-Clerk, Elder v. Young*, 15 Nov. 1854, 17 D. 56.

(*i*) *Russell v. Kirk*, 27 Nov. 1827, 6 S. 133.

(*e*) 1 Bell, 415; also *ante*, p. 286.

null, taken by a notary on a bill wherein he was acceptor, holding, 1st, That he was excluded, as he alleged that he had signed the bill for the drawer's accommodation, and was therefore interested to preserve recourse against him; and, 2^{dly}, That, in no event, is a protest taken by an acceptor on his own bill valid. They held no reduction of the protest to be necessary, as the nullity appeared *ex facie* of it and of the bill. It has also been decided, that a protest is null, if taken by a notary who is drawer and indorser of the protested bill (a). But it has been held no objection to a protest on a bill payable at the office of the drawer and holder's son, that he, being a notary, had taken the protest (b). This doctrine was confirmed in another case (c), where it was also decided, that the circumstance of the notary being a partner of the drawers, could not invalidate the protest to an onerous holder of the bill, when not apparent *ex facie* of it; and further, that his liability for the company's debts, from not having sufficiently notified his retirement, was not, in any event, enough to disqualify him.

It is said (d), that in England, when there is no notary at or near the place of payment, an instrument will be sufficient, if drawn up and signed by any respectable inhabitant before two witnesses, and, as to inland bills, there is an enactment to that effect (e); but no such rule has been judicially recognised in Scotland.

Must the
notary himself
present?

It is safest, and seems most conformable to principle, that the notary should himself present the bill or note, although it has been questioned whether it would not be sufficient that his clerk should present it. In one case (f), of a bill made payable in London, and protestable there, this was held sufficient, on a proof that it was conformable with the universal practice in London. 'And in another case (g), of a bill drawn and payable in Glasgow, it was held sufficient for the notary's clerk to present, and the notary thereafter to extend the protest on his report,—it appearing that this was the ordinary practice with all the notaries in Glasgow

(a) *Leith Banking Co. v. Walker's Trustees*, 22 Jan. 1836, 14 S. 332.

(b) *Reid v. Grindlay*, 19 Nov. 1830, 9 S. 31.

(c) *Mackenzie v. Smith*, 23 Nov. 1830, 9 S. 52.

(d) Bayley, 259; Molloy, 2, 10, 17; Chitty, p. 315.

(e) 9 & 10 Wil. III. c. 17, § 1.

(f) *Stevenson v. Stewart*, 14 Nov. 1764, M. 1518, 1593.

(g) *M'Cartney v. Hannah*, 11 Feb. 1817, H. 76.

but one, and that it would be attended with much inconvenience **and** expense if the thing were not to be allowed to be done in that **way**. On the authority of these two cases, it may now therefore be **held** as settled, that presentment by the notary's clerk is sufficient (a). **In** England, it was at one time doubted whether such a presentment **was** valid. That doubt seems to have been suggested by the language of Buller, J. (b), who said that the presentment must be made **by** the notary, because credit was given to him as a public officer; **but** as he was speaking of a presentment and demand which had **been** made by a banker's clerk in order to a protest, the language is **not** applicable. Besides, the common practice of notaries to use **their** clerks for that purpose, as it would be impossible otherwise to **conduct** their business, is a practice which is amply justified by the **law** of principal and agent, and not questioned in any case which **has** occurred before the Courts of England (c).'

If the debtor in a bill or note refuse acceptance or payment to **the** notary, the latter makes a minute at the time on the bill or **note**, containing his initials, the year, month, and day, and the **refusal** to accept or pay, with the reason of refusal (though this is **not** always noted), and an account of his charges. This is called **noting**. It was at first only the taking of a memorandum by the **notary** to assist his memory in extending the protest, and was said to be "unknown to the law as distinguished from the protest" (d). But it **seems** to be now held, both in Scotland and England, that noting is **a** kind of initial protest, which will be sufficient in the meantime, if **an** instrument of protest is regularly extended afterwards. This **doctrine** is applicable equally to foreign and to inland bills (e).

(a) Menzies on Conveyancing, 3d ed. p. 367.

(b) *Leftley v. Mills*, 1791, 4 T. R. 170.

(c) Note by the editors, Chitty, p. 315.

(d) *Per* Buller, J., in *Leftley v. Mills*, 4 T. R. 175.

(e) *Brown v. Dunbar*, 8 Dec. 1807, *Morr. App. v. Bill*, 27. In England, in *Chaters v. Bell*, 1801, 4 Esp. 48, being an action by the indorsee against the indorser of a bill drawn in Ireland, payable in London, when it was ob-

jected that there was not, as there ought to have been, a protest regularly drawn up of the same date with the dishonour of the bill, Lord Kenyon held, "that if the bill was regularly presented and noted at the time, the protest might be made at any future period." Lord Ellenborough, on this case coming afterwards before him, expressed the same opinion. The general doctrine was confirmed in *Geralopulo v. Wieler*, 20 Feb. 1851, 20 L. J. (C. P.) 105.

Extending the protest.

The notary's duty, after presenting and noting the bill or note, is to draw out the instrument of protest, as the legal certificate of his whole proceedings. This instrument is generally extended from the bill, or, if that cannot be obtained, from a copy (*a*). If even this cannot be got, as if the bill is lost, the protest ought still to be taken, and will probably be sustained, since no person can be bound to perform an impossible condition (*b*). The protest, in that case, should state why neither the bill nor a copy of it can be had. 'There is no limit to the time after the noting, within which the protest may be extended, though after the expiry of six months it will be useless for the purpose of using summary diligence. In one case a protest was sustained which was not extended till fifteen years after the noting (*c*). But there must be authentic evidence from which to extend, the notary not being permitted to trust to his memory for the requisite particulars (*d*). This evidence usually consists of the marking made on the bill at presentment, the use of protocols or registers of their proceedings having long been discontinued by the notaries of this country (*e*). In one case, an improperly stamped protest was allowed to be used as materials for extending a new protest on a proper stamp (*f*). It would appear to be competent for a notary to extend a protest of a bill presented and noted by his clerk, even after the clerk's death (*g*). But if the notary who presented were himself to die, or to be absent, it has been doubted whether from his noting, another notary could extend (*h*).'

Stamp.

The instrument of protest must be written on paper duly stamped, the stamp-duty being proportioned, according to the rates

(*a*) *Dehers v. Harriot*, 1 Show. 164. In this case, a foreign bill (first and second), which was payable in Dublin, having been indorsed to a third party, to whom also the first number of the bill was sent, but lost on the way, and, lest the second should likewise miscarry, a copy only of it having been sent to him, on which a protest was taken, the protest, in an action by an indorser, was held to be good, the original of the second bill having been produced at the trial.

(*b*) Pothier, No. 145.

(*c*) *Alexander v. Scott*, 28 Nov 1827, 6 S. 150.

(*d*) *Barbour v. Newall*, 23 May 1823, 2 S. 328.

(*e*) *Menzies on Conveyancing*, 3d edition, p. 367.

(*f*) *Balfour v. Lyle*, 21 July 1832, 10 S. 853.

(*g*) In *Poole v. Dica*s, 5 May 1835, 4 L. J. (C. P.) 196, an entry of presentment and dishonour, made by a clerk in a notary's register, was admitted as proof of dishonour after the clerk's death.

(*h*) Chitty, p. 323.

mentioned in the Appendix, to the amount of the bill or note. It has been held (*a*), that an instrument of protest including several bills is ineffectual, as being a fraud on the Stamp Acts, which require a separate instrument for each bill.

The bill or note, with all the indorsements, whether in full or in blank, must be prefixed *verbatim* to the instrument of protest. This is necessary, both to identify the bill or note, and to indicate to the drawer or indorsers what party is entitled to payment (*b*). The instrument must then narrate, that the bill or note was presented for acceptance or payment, and must state the answer, if a special one, or otherwise, that the demand of acceptance or payment was not complied with, in order to prove that there has been a failure to accept or pay (*c*), 'though it seems not requisite to set forth at whose instance (*d*).' Lastly, it must declare, that, in consequence of such failure, the holder is entitled to full recourse against the previous parties. The particulars of his claim under this head shall be afterwards discussed, in considering Action and Diligence on Bills or Notes.

Contents of
protest.

With regard to the words of the instrument of protest, whether for non-acceptance or non-payment, the law does not appear to be very strict, if its meaning is clearly expressed. Thus in the case of a bill which had not been presented for acceptance, a protest taken against the drawer for exchange, re-exchange, and other damage arising through non-payment, was held to be a protest for non-payment, although it did not bear expressly whether it was taken for non-payment or non-acceptance (*e*). In the case here mentioned, the Court adopted another doctrine which would not now be followed, viz., that the holder still had his recourse, though he did not take the protest for five months after the term of payment, as the drawer did not prove that he had thereby suffered loss. But the decision as to the import of the protest seems unobjectionable. In

Form of words
to be used.

(*a*) *Barbour v. Newall*, 23 May 1823, 2 S. D. 328. A bill of suspension was passed partly on the same ground, in *Napier v. Carson*, 17 Jan. 1824, 2 S. 622.

(*b*) Pothier, No. 135.

(*c*) *Vide* Form of Protest, App., and also Pothier, No. 135. The Act 1681,

c. 20, says nothing about the protest, except that the bill shall be prefixed to it; referring, as to its form and contents, to the previous practice.

(*d*) *Elder v. Young*, 15 Nov. 1854, 17 D. 56.

(*e*) *Yuill v. Richardson*, 25 July 1699, Forbes, 94 and 95.

another case (*a*), a protest was sustained, which bore merely that the bill had been “duly protested,” without stating that the protest had been taken at the place of payment; the Court holding that the words “duly protested” implied that everything necessary had been done, and also taking into view that it was not the general practice to specify in the protest that it had been taken at the place of payment. But, though general expressions will be held to include the particulars falling naturally under them, yet, if the protest enters into particulars, it must bear that the requisites referred to were fully observed. For instance, when a bill was payable, according to its tenor, at the drawee’s house, it was held to be a good objection against the protest that it bore presentment to have been made only in the town of Cromarty, where he resided (*b*).

Witnesses.

The names of the witnesses to the protest must be stated in the instrument, and it is also proper to mention their designations (*c*). But it has been decided, that neither their designations nor their subscription to the protest is necessary, as bills or notes, and protests on them, being instruments *juris gentium*, are not comprehended in the statutory enactments regarding the solemnities of probative writs in Scotland (*d*). ‘In fact, the insertion of the names of witnesses is now a mere form, the notary inserting any names he pleases, and the witnesses almost never being present. As Professor Menzies points out, this custom, however extraordinary, has been recognised and sanctioned by the Courts (*e*).’

Formal protest, when completed, is probative.

The instrument, drawn out in the manner now described, is probative equally against the drawee or granter of the bill or note, and all other parties, unless set aside by a reduction-improbation; and, even in such a process, it has been held not to disprove the instru-

(*a*) *Commercial Bank v. Hannay*, 24 Feb. 1818, F. C.

(*b*) *M’Kenzie v. Urquhart*, Jan. and Feb. 1731, Morr. 1561. This was one of the points stated; but there was also an objection of want of notice of dishonour. The Court were of opinion generally that there had not been due negotiation.

(*c*) 1 Bell, 414.

(*d*) *Inglis and Foulis v. M’Kie*, 1697, Forbes, 89. It is probably the

same case which is noticed by Fountainhall, Morr. 16971, under the name of *Inglis v. Clark*, 21 July 1697; at least the point there decided is, that a protest on a bill is good, though the witnesses neither are designed nor subscribe.

(*e*) Menzies on Conveyancing, 3d edition, p. 369; *M’Cartney v. Hannah*, 11 Feb. 1817, H. 76; *Stevenson v. Stewart*, 14 Nov. 1764, M. 1518, 1593.

ment, that the witnesses merely did not recollect of the protest (a).
 'Thus it is not competent in a suspension, without a reduction, to plead that a house at which the bill was protested, as being the residence of the acceptor, was not truly so, but that his residence was elsewhere (b). A reduction is unnecessary, however, when the nullity appears *ex facie* (c).'

The bill or note must, as already mentioned, be noted for non-acceptance or non-payment as soon as acceptance or payment is refused, and therefore the time for noting must depend on the time for presenting, which has been already fully explained. It has been shown, that in the case of a bill or note payable at a fixed term, presentment for payment must be made, and a protest for non-payment taken, at least by noting, on the last day of grace (d). It has been held, that, when the last day of grace falls on a Sunday or holiday, the protest must be taken the day before, and that a protest taken the day after will be null (e). When the day on which notice of non-payment or non-acceptance ought to have been given, though not regularly observed as a holiday, is one on which the holder's religion forbids him to attend to secular business,—for instance, when it falls on the day of a Jewish festival, and the holder is of that religion,—it has been decided in England that he will be thereby excused from giving notice till the next day (f). The same principle seems applicable to the presenting or protesting of bills or notes; since the holder cannot be expected to employ a

Time for protesting,

(a) *Berry v. Balfour*, 16 July 1822, 3 Murr. Rep. 116.

(b) *Telfer v. Barrow*, 30 Nov. 1844, 7 D. 170.

(c) *Russell v. Kirk*, 27 Nov. 1827, 6 S. 133.

(d) *Antea*, p. 247, and 296. *Per Buller*: "With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace;" *Lefley v. Mills*, 1791, 4 T. R. 170.

(e) *Smith v. Laing*, 29 June 1786, M. 1612. This was the case of a bill drawn and accepted in London, where it was likewise payable. The holder, therefore, maintained that it must be considered as an English inland bill,

with regard to which no protest was necessary. But the answer was, that it had been first indorsed to Laing, Arthur, and Co. in Scotland, who afterwards indorsed it to Smith and Payne of London; and that the question arose from a claim of recourse, by the latter against the former, by virtue of the indorsation, which was in law a new bill, and must, as between them, be considered as a foreign bill. The Court virtually sustained this answer, by deciding, as in the case of a foreign bill, that taking a protest on the day after the last day of grace, which had fallen on a Sunday, was not due negotiation.

(f) *Lindo v. Unsworth*, 2 Camp. 602.

some reason to doubt the soundness of this decision (*a*). But it will afterwards appear that, by special statute (*b*), diligence may proceed, under certain circumstances, in name of an indorsee, although the protest should not have been even extended in his name.

Protest when
drawee bank-
rupt, or

The doctrine which has been already stated as to presentment, viz., that the want of it is not excused by the drawee or granter's bankruptcy before the term of payment (*c*), is equally applicable to protests (*d*).

when bill
invalid.

If a bill or note is not written on the stamp prescribed by law, the want of a protest will not, more than any other neglect of negotiation, cut off the holder from his claim for any debt on account of which it was given, more than if no bill had been granted.

Protest for
better security.

Although the drawee has accepted the bill, yet, if he has absconded or become bankrupt before the time of payment, so that there is no chance of recovering it from him, the practice in England and on the Continent is, that the holder protests for better security, and gives notice of his protest to the drawer and indorsers (*e*). This measure serves only the purpose of notifying the acceptor's situation to the drawer and indorsers, so as to afford them time to make other arrangements for payment. It seems to be settled, that, on the one hand, the holder does not lose his recourse against the drawer and indorsers, though he should not take such a protest; and, on the other hand, that, if these parties refuse to give better security, he cannot sue them on the bill till the term of payment arrives (*f*). Such a proceeding was never recognised in Scotland; and, indeed, it seems to be virtually excluded by the statutes regarding diligence and action on bills and notes (*g*), which, in describing the procedure to be followed on them, mention no protests but those for non-acceptance and non-payment, and authorize no measures to enforce payment, either by summary diligence or ordinary action, against drawer or indorsers, before the term of payment, unless in case of non-acceptance, or after this term, in case of non-payment (*h*). If any of the parties is *vergens ad inopiam*

(*a*) *Vide* chap. on Action and Diligence.

(*b*) Act 12 Geo. III. c. 72.

(*c*) *Antea*, 305.

(*d*) *Vide* cases cited.

(*e*) *Marius*, 111; *Beawes*, No. 22-30.

(*f*) *Beawes*, Nos. 25, 26.

(*g*) 1681, c. 20; 1696, c. 36; 12 Geo. III. c. 72.

(*h*) *Vide* *Forbes*, 96-7.

but it will be enough "to present the bill as a letter of credit, and demand payment, and to notify the refusal to the indorser within a reasonable time" (a). The reason is, that the indorsee has been necessarily precluded from protesting within the time during which a protest could be of use. But the previous indorsers will, notwithstanding, be entitled to plead, that *the last indorser*, if he has not protested in due time, has lost his recourse against them, and consequently that his indorsee, as coming only into his right, can have no claim against them (b).

As to the time of day for taking a protest, it has been generally said, that it ought to be taken between sunrise and sunset, or at least during the usual hours of business (c). In other respects, the rule on this point seems to be the same as with regard to the hour of presentment (d).

Hour for protesting.

The necessity, as well as the mode of protesting a bill, in case of a conditional or partial acceptance, so far as it is not accepted with a view to preserve the holder's recourse against the drawer or indorsers, has been already discussed (e). It has been likewise shown, that, on partial payment of a bill or note, the holder must protest it for non-payment, as to the residue (f).

Protest on varying acceptance or partial payment.

It has been held to be no objection to a protest, that, although it was taken in name of a bank with which the bill had been discounted, the instrument was afterwards extended in name of the chargers, on their taking up the bill from the bank (g). There is

Protest by one person extended for another.

(a) This was decided, in conformity with the opinion of the London merchants, given in the words cited in the text, in *Young v. Forbes*, 19 June 1749, Morr. 1580. The bill then in question was drawn at Philadelphia on a person in London, where it was made payable. But both the indorser and indorsee, between whom the question arose, were resident in Aberdeen; so that, agreeably to the principle of *Smith v. Laing*, 315, note (e), the bill must, as between these parties, have been considered as a Scotch bill, though the indorsee was probably bound to follow the rules of negotiation established in London, the place where it was made payable. Accordingly, the opinion of

London merchants was obtained, to the effect already stated. A similar decision was afterwards given in a question of recourse by the indorsee, against the indorser of a bill indorsed after the term of payment, in *Cooper v. Clark*, 27 Feb. 1777, Morr. 1604, and App. v. Bill, p. 3.

(b) In the case stated in the preceding note, it seems to be implied that *the indorser* was bound to have protested the bill.

(c) *Marius*, 112; *Forbes*, 88.

(d) *Antea*, p. 302.

(e) *Antea*, p. 226.

(f) *Antea*, p. 262.

(g) *Mackie v. Hilliard*, 15 June 1822, 1 S. 499.

are those which proceed on a protest for non-acceptance by the drawee.

By whom.

If a bill is drawn, not for behoof of the drawer, but on account of some third party, the drawee, though he do not choose to accept on this party's account, may do it *supra* protest for the honour of the drawer; or, when he does not wish to accept a bill for behoof of the drawer, he may do it *supra* protest for an indorser (*a*).

But holder may refuse.

It has been said that the holder cannot refuse such an acceptance, if he has no reason to suspect the credit of the person offering it, or if that person offers good security (*b*). But, as every bill is addressed to the drawee, and requires only *his* acceptance, the holder, by taking such a document, does not seem bound to admit anything but the drawee's absolute acceptance. This doctrine has been held in the English Courts (*c*). It is laid down by an author who states the contrary doctrine (*d*), that, when the holder refuses such an acceptance, even from the drawee, and protests for want of an absolute acceptance, the latter ought, in prudence, to have his acceptance *supra* protest cancelled. If the holder does not take such an acceptance *from the drawee*, it would appear that he cannot follow out measures against the drawer or indorsers for want of a simple acceptance, since the drawee is liable to him as directly as under an absolute acceptance (*e*), the only effect of the acceptance *supra* protest being to give *the drawee* recourse against the drawer or indorser, for whom it is made. Nor will it be necessary, in such a case, for the holder of the bill to give notice to the drawer or indorsers (*f*). In this case, the acceptor *supra* protest pays the expense of the protest, as it is taken only for his benefit (*g*).

Effect of holder receiving.

There is reason to think (although the matter does not appear to have been decided) that the holder may take an acceptance for the honour of the drawee from a third party, and yet sue the drawer or indorsers for want of acceptance by the drawee, as he has not got the security stipulated by the bill (*h*). 'In England, it is thought

(*a*) Beawes, Nos. 33-4.

(*b*) Scarlett, C. 12, R. 6; Beawes, Nos. 27 and 36.

(*c*) *Mutford v. Walcot*, 1700, 12 Mod. 411.

(*d*) Beawes, No. 37.

(*e*) Scarlett, C. 12, R. 15.

(*f*) *Ibid.* C. 7, R. 16.

(*g*) *Ibid.* C. 12, R. 6.

(*h*) This rule is laid down in *the* modern French Code de Commerce, B. 1, t. 8, § 4, No. 128, and appears, besides, to be conformable with sound principle.

that the holder's right, in such circumstances, to sue these parties remains in abeyance till the maturity of the bill (a). At all events, the holder, by taking an acceptance for the honour of an indorser, will not abandon his right to protest, either against the drawer or against any prior indorser (b). If he takes an acceptance for the drawer's honour, without protesting for want of an absolute acceptance, he cannot have recourse against him as on a dishonoured bill (c).

Any other person besides the drawee may accept a bill *supra* protest for the honour either of the drawer (d), or of an indorser (e), or both of drawers and indorsers, so as to bind both to the acceptor (f). It has been even said that the holder of a bill, after protesting it for non-acceptance, may accept it for the honour of the drawer, or of any indorser (g). In that case, he must give the same notice to the party for whose honour he accepts, which he is bound to give to the drawer and indorsers of the dishonour of a bill (h). In general, every acceptor *supra* protest is bound to give such notice to the party for whose honour he accepts; and, when such an acceptance is made by another person than the drawee, the holder must give notice, as in case of non-acceptance, to all the other parties against whom he means to preserve recourse.

For whom, and when, to be intimated.

Several persons may accept *supra* protest, either jointly for the honour of one person, or for the honour of an individual drawer or indorser respectively. A person who intended to accept may refuse to do so with another person; but, if he chooses to accept, he cannot prevent another from accepting with him. Nor does there seem to be any reason why one party should not accept for honour of the drawer, while another accepts for honour of an indorser. For, although the last of these acceptors, as coming in place of the indorser, will have relief against the first, who comes in place of the drawer (i), that is a matter between themselves, and has no refer-

Plurality of acceptances *supra* protest.

(a) Chitty, p. 238.

(b) Scarlett, C. 12, R. 15.

(c) Beawes, No. 40.

(d) Beawes, No. 39; per Lord Ellenborough, in *Jackson v. Hudson*, 1810, 2 Camp. 447; Scarlett, C. 12, R. 10.

(e) Beawes and Scarlett, *ibid*.

(f) Scarlett, C. 12, R. 12.

(g) Beawes, No. 38; Scarlett, C. 12, R. 9.

(h) Beawes, No. 34.

(i) Beawes, No. 42; Scarlett, C. 12, R. 17.

ence to the holder, to whom the indorser, as well as drawer, is directly liable, on non-acceptance *by the drawee*; so that acceptance for the indorser's honour is necessary to protect him, as well as the drawer, from such a claim. There does not, therefore, appear to be any room for a question which has been raised (a), viz., which must be preferred to the right of thus accepting a bill, the person wishing to accept for the drawer's honour, or for the honour of a prior or that of a posterior indorser; since the holder cannot be obliged to take any acceptance not in terms of the bill, and may therefore refuse all or any of these acceptances, while, if he consents, all of them may be adhibited together. If the drawee accepts simply, there is no room for any of them.

Inquiries before accepting *supra* protest.

It is said that, before a person accepts for the drawer's honour, he should inquire why the drawee has suffered the bill to be protested (b). Though this may be proper for his own safety, it is not necessary to make his acceptance effectual, either to the holder or to himself, as a ground for claiming relief from the drawer. Such inquiry is not necessary to a person accepting for the honour of an indorser, since neither the claim against him nor his responsibility is affected by the state of accounts betwixt the drawer and drawee (c). But it may be proper, even in that case, to ascertain what chance there is of the indorser and his acceptor making good their relief from the drawer's funds in the drawee's hands.

Acceptance for honour of insolvent.

If a person, having funds of the drawer or of an indorser, accepts for their honour after he knows of their insolvency, the acceptance cannot operate as a transference of these funds, being only a device for transferring them to the holder of the bill, *in fraudem* of the drawer or indorser's other creditors. But, if he has no such funds, his acceptance does not seem to be challengeable, as it would give him no more than the claim of relief against their estate, which would have been competent to the holder (d).

Mode of accepting *supra* protest.

This kind of acceptance, after the bill has been first protested for non-acceptance, is adhibited by the acceptor appearing person-

(a) Forbes, 76-7.

(b) Beawes, No. 45.

(c) Scarlett, C. 12, R. 20.

(d) Mr Forbes, 75, states that such an acceptance is void in all cases. In doing so, he follows the authority of

Scaccia, § 2, Gloss. 5, No. 391. I have presumed to lay down the distinction stated in the text, as it appears to be more conformable with sound principle.

ally before a notary-public with two witnesses, and declaring that he accepts the protested bill for honour of the drawer and indorser, and will pay it when due. He must then subscribe the bill thus: "Accepted *supra* protest in honour of J. B.;" or, as is more usual, "Accepts S. P." (a). He likewise, it is said, generally subscribes, under the protest, a doquet, bearing that he will pay the sum contained in the bill (b). The whole of these proceedings must be narrated by the notary in form of instrument, which ought to be sent without delay, with notice of the acceptance, to the party for whose honour it is made. Unless the nature of the acceptance is expressed as now stated, the acceptor will have no recourse against any of the parties (c). Such proceedings are necessary to bind the party for whom the acceptance is made; and also as a precaution against the chance of the drawee, after accepting simply, prefixing to his acceptance, on hearing of the drawer's failure, "accepted *supra* protest for the honour of the drawer or some of the indorsers" (d). This kind of acceptance, therefore, cannot now be interponed, except in the manner already stated, and after a protest for non-acceptance. An acceptance "*supra* protest," generally, is understood, unless the contrary is expressed, to be made for honour of the drawer.

An acceptor *supra* protest is bound absolutely to the holder of the bill for its amount, without regard to the protest (e), that being intended only to regulate his claim of relief. If the acceptance *supra* protest is general, or bears to be for honour of the drawer, the acceptor will be liable to all the subsequent indorsees; if for the honour of a particular indorser, he will be liable to the parties after this indorser. But his obligation is only conditional, viz., in case the drawee should fail to pay; and therefore, although the drawee has refused acceptance, yet, as he may pay, the bill must be protested for non-payment before the acceptor *supra* protest can be liable (f).

Liability of
acceptor *supra*
protest.

(a) Beawes, No. 38; Chitty, p. 239.

(b) Chitty, 374.

(c) *Carstairs v. Paton*, 15 Dec. 1703, M. 1529.

(d) Forbes, 74.

(e) Implied in *Mutford v. Walcot*, 1700, 12 Mod. 411.

(f) This was decided, after a full consideration of authorities, by the Court of King's Bench, in *Hoare v. Cazenove*, 1812, 16 East. 391; vide also Pothier, No. 137. A similar decision was also given by the Court of King's Bench in *Williams v. Germaine*,

Place of presentment.

It was once held, in a case where a party (after the drawee had refused to accept) accepted for honour of the drawer, but only to be paid if the bill be "regularly protested and refused," that, in consequence of such an acceptance, the bill, though made payable in London, must be again presented to the drawer for payment, at his residence (Liverpool), and protested, before it could be validly presented for payment to the acceptor *supra* protest in London (a). The decision was rested on the peculiar terms of the acceptance. But, though it had been in general terms, it seems to have been held that, according to the practice, presentment at the drawer's residence, though not necessary, would have been good. By a subsequent statute, however, already noticed (b), it is enacted, that, when a bill made payable at a different place from that of the drawee's address, has been presented for acceptance, and that has been refused, it may be protested, without further presentment, at the place of payment, unless it be paid to the holder on the day when the bill falls due.

Time for presentment.

'As there was some doubt when bills accepted *supra* protest for honour should be presented for payment to the person who has so accepted them, after they have been protested for non-payment by the drawee, an Act (6 & 7 Will. IV. c. 58) was passed to regulate the time. By that Act the holder is allowed the day after the day on which the bill fell due, to present to the acceptor *supra* protest: or, if the acceptor *supra* protest lives at a different place from that where the bill was payable, the holder has the same allowance of time to forward the bill for presentment. If the day after the bill falls due happens to be a Sunday, Good Friday, or Christmas-day, or a day appointed by royal proclamation for fast or thanksgiving,

1827, 7 B. and Cr. 468, where a bill payable thirty days after sight, from the date of presentment for acceptance, which would have made the day of payment 14th August, having been refused by the drawee, but accepted for the drawer's honour, payable 22d August, it was held, 1st, That, to give a claim against the acceptor, or against the drawer, it was necessary to present it to the drawee for payment only on 22d August; but, 2dly, That, when

presentment to the drawee for payment was not averred in the declaration (though the bill was averred in general to have been duly presented) judgment must be arrested, both against the drawer and against the acceptor for his honour.

(a) *Mitchell v. Baring*, 10 B. and Cr. 4.

(b) 2 & 3 W. IV. c. 98, *antea*, p. 308. *Vide* Chitty on the object of this statute, p. 241.

the holder has till the day after it for these purposes. The Act regulates in a similar manner the time for presentment for payment to a referee in case of need.'

On the other hand, he will have a claim of relief for the amount of the bill, and for all costs and charges (a), against the party for whose honour he accepted, and against the previous parties, who are liable in relief to his principal (b). But, to secure this recourse, notice must be given to all these parties, either by him or his principal, or by some other party interested, of the acceptance *supra* protest, as required with regard to notice of dishonour. The acceptor *supra* protest has no claim against any parties subsequent to the person for whose honour he accepted. For instance, an acceptor for the drawer has no claim against an indorser, nor an acceptor for the honour of a prior indorser against a posterior indorser (c). If the holder of a bill accepts for honour of a certain party, he can have no claim of relief as acceptor against the indorsers subsequent to that party, though he does not lose his claim against them as holder. Nor can he proceed against them as for non-acceptance, since his acceptance was intended to relieve the party for whom it was made from being sued for non-acceptance, and must therefore produce the same benefit to them, who are in his right. His claim against them as holder cannot be effectuated till the bill has become due.

Right of such acceptor to recourse,

The drawee of a bill, after it has been protested for non-acceptance and accepted *supra* protest, may still adhibit his acceptance, for example, on getting new advice from the drawer; although the holder is not therefore bound to release the party who has accepted *supra* protest (d). In such a case, the drawee must pay the acceptor *supra* protest his charges, which are available against the drawer and indorsers, and must therefore be good against him (e). So, a party accepting for the drawer's honour must refund these charges to a person who has accepted *supra* protest for the honour of an indorser.

and payment of charges.

(a) Scarlett, C. 12, R. 19.

(c) Beawes, No. 49.

(b) Beawes, No. 49; vide *Smith v. Nissen*, 1 T. R. 269, which, although it was a case of *payment supra* protest, involved the same principle.

(d) *Ibid.* No. 41.

(e) Scarlett, C. 12, R. 16, 17; Forbes, 77.

2. *Payment supra Protest.*By whom
made.

When payment of a bill, whether foreign or inland, or of a promissory-note, has been refused, any person not a party to it **may** pay it, for honour either of the drawer or any of the indorsers **(a)**. But he cannot, it is said, be allowed to pay for honour of a party against his express orders **(b)**, and he will acquire no right of **action** by so doing. The drawee of a bill, as he may accept, may also **pay supra** protest, for the honour either of the drawer or of any **in-**dorser, unless he has previously accepted simply; in which case **he** cannot pay for the honour of an indorser, because he is then **bound** to all the indorsers absolutely, whether he has effects of the **dra**w-er or not **(c)**. But, if he has not effects, and this can be proved, **not-**withstanding his acceptance, by the drawer's writ or oath, he **may** suffer the bill to be protested, and pay **supra** protest, whereby **he** will have recourse against the drawer **(d)**. He will not, **howe**-ver, be entitled to summary diligence against the drawer on the **bill**, because *ex facie* of it he is the proper debtor.

How made.

In general, no party ought to pay a bill or note for honour of any other party, unless it has been previously protested for **non-**payment. Nor can payment be safely made, if the protest **has** been taken beyond the days of grace, because such a protest **is** null **(e)**. Even a person who has previously accepted **supra** protest as has been shown, is not bound to pay, till the bill has been **pro-**tested for non-payment, as well as for non-acceptance, against **the** drawee **(f)**. It is said, indeed, that he may pay without such protest for non-payment, if the person for whose honour he **ac-**cepted has, in the meantime, approved of his acceptance **(g)**. **But** a person who has not previously accepted **supra** protest, **besid**-e requiring a protest for non-payment, must also, to pay safely, **de-**clare before a notary that he does so in honour of the drawer - some other party, and such declaration must be engrossed by the **notary**, either in the protest for non-payment, or in a separate **in-**strument.

(a) Marius, 128.

(b) Dupuys de la Serra, C. 9, No.

21.

(c) Beawes, No. 51.

(d) Beawes, No. 52.

(e) Forbes, 115.

(f) Antea, 323.

(g) Beawes, No. 48.

strument (a). It has been argued, and with justice, that no such protest requires to be taken before payment, by a person who has previously accepted *supra* protest, because he must be presumed to pay under the qualifications expressed in his acceptance (b).

The rules regarding notification of payment *supra* protest to the party for whose honour it is made, by sending the protest on which it proceeds, or otherwise, are the same as with regard to acceptance *supra* protest (c). It is said, indeed, that, when the acceptor *supra* protest lives in a different place from the original drawee, so that notice of the latter's non-payment of the bill cannot be given on the day when it has been protested against him for non-payment, a reasonable time will be allowed for giving notice. In general, such notification, to secure recourse, must be given within the same time as notification of the dishonour of a bill is given by the holder to the drawer or indorsers (d).

It has been said, that the holder of a bill is not obliged to take payment *supra* protest, unless the party offering it declares that the credit of the person for whom he offers it was specially recommended to him (e). But it may be doubted whether he can refuse such an offer of payment on any ground.

It has been stated, that, when several parties offer to pay a bill or note *supra* protest, preference must be given to him who offers payment for the honour of the drawer, and to him likewise who offers payment for a prior indorser, over him who offers it for a posterior indorser (f). The principle appears to be, that payment ought to be taken from the person coming in place of the party by

(a) Scarlett, C. 18, R. 4; Marius, 128; Beawes, No. 53. The extension of a regular instrument of protest at the term of payment, and not afterwards, is said to have been held necessary, in order to authorize recourse on a payment *supra* protest, in the case of *Vandewall v. Tyrell*, 1 M. and Malk. 88; but that case is now ascertained to have been misreported, and in *Generalopulo v. Wieler*, 20 Feb. 1851, 20 L.J.(C.P.) 105, an instrument of protest afterwards extended by the notary from an entry made at the time in his notarial register was held good.

(b) Forbes, 116-7.

(c) *Antea*, p. 321.

(d) Dupuys de la Serra, C. 10, No. 10. Scaccia, § 2, Gloss. 5, No. 362, refers to a case which was decided on the same principle. Forbes, 114, refers to these authorities, and repeats their doctrine. See also *Ochterlony v. Hunter*, 28 Dec. 1743, decided on appeal, 9 April 1745, M. 1567, and 1 Pat. App. 396.

(e) Scarlett, C. 18, R. 6; Beawes, No. 55.

(f) Forbes, 115.

Intimation.

Can holder refuse such payment?

Case of several offers.

whom the bill or note is most properly due. But the case is not likely to occur. The party who has paid for honour of a posterior indorser must, it is said, take back his money, unless he has already redrawn it, from any party offering to pay for the drawer or for a prior indorser, provided such party indemnifies him for his charges, to which he has the same claim that an acceptor for honour of a posterior indorser has against the acceptor for honour of the drawer, or of a prior indorser (a).

Remedy of
party paying
supra protest.

A person paying a bill or note for honour of a party to it, even without his knowledge or consent, is said to be entitled to require from the holder a transference of his right (b). But he cannot be entitled to an absolute transference, because his mode of interference excludes him from having such a claim as the holder would have had, against parties posterior to the individual for whose honour he pays. On the other hand, though he has got no formal transference, he will have the same claim on the bill or note that the holder could have made against the party for whose honour he made payment, and against the parties liable to him (c). He has therefore a claim against the acceptor who has failed to pay, because he, being primary debtor, is liable to all the other parties, and therefore to the party for whose honour payment has been made. But if the drawee has accepted without value from the drawer, and this is proved in Scotland by his writ or oath, the party paying for the drawer's honour, being only in his right, will have no claim against the acceptor (d). A party paying for the honour of an

(a) Forbes, 115; *antea*, 321.

(b) Scarlett, C. 18, R. 7.

(c) Scarlett, C. 18, R. 5. This rule was followed in *Mertens v. Winnington*, 1 Esp. 112, where a party paying for the honour of an indorsee was found entitled to recover against the drawer. Lord Kenyon, in this case, laid it down generally, that a party so paying acquires thereby all the indorsee's rights, so as to be entitled to recover from the different parties to the bill. But it does not appear that he can recover from any except the party for whose honour he paid, or the parties prior to him on the bill. This is all the right which his payment *supra*

protest appears to carry, since it merely puts him into the situation of the party for whose honour he pays. He cannot, therefore, be considered as an indorsee to all intents and purposes. There is no decision finding him entitled to claim from a party posterior to the person for whose honour he has paid. The doctrine now stated is confirmed by Bayley, 329, and by the case of *Hall v. Pitbl*, there cited by him. *Vide* on the same subject, *Smith v. Nissen*, 1786, 1 T. R. 269, where a person paying for the honour of the drawers was found entitled to recover from them.

(d) *Ex parte Lambert*, 13 Ves. 179.

indorser will not be affected by this circumstance, because the indorser, in whose right he stands, has a claim independent of it. In England, where acceptances are admitted on a protest for better security, after the drawee has accepted (lest he should become bankrupt), a person who has accepted even for the drawer's honour, after an acceptance by the drawee, has been found entitled to claim on the drawee's estate (*a*). But such a party, having accepted before the term of payment, was probably led to do so by the drawee's acceptance, which warranted him to believe that the latter's funds, at least so far as they went, would be applied in payment of the bill, whereas a person paying after the drawee had failed to pay, could not be supposed to rely on him. Such a person is justly placed in the situation of the party for whose honour, and in reliance on whose credit, he made payment.

SECTION IV.

NOTICE OF NON-ACCEPTANCE OR NON-PAYMENT.

1. *Necessity for Notice.*

When acceptance or payment of a bill, or payment of a note, is refused by the drawee or granter, or is not made in terms of the bill or note, it is necessary, to preserve recourse against the other parties, that notice should be given them of non-acceptance or non-payment. This rule is equally applicable to foreign and to inland bills. The purpose of it is, that the several parties may take measures to secure themselves, by recurring against the persons liable to them respectively on the bill or note; for instance, that the drawer may, on non-acceptance, withdraw his effects from the drawee, and that the other parties may seek payment or relief from those prior to them. But the rule is not relaxed, although it should appear that the previous holders have not been prevented, by want of notice, from doing all which they could otherwise have done for their indemnity. This would indeed appear, at first sight, to be the natural result of the principle now stated; and, accordingly, it was

Purpose of
requiring
notice.

(*a*) *Ex parte Wackerbath*, 5 Ves. 574.

once held both in Scotland and England, that the party pleading want of notice must prove that he had thereby suffered damage.

Damage by
want of notice
need not be
proved.

But the contrary rule is now settled, viz., that failure in giving due notice, or in any other step of negotiation, absolutely bars recourse, and that it is not competent to inquire whether injury has been thereby sustained or not (*a*). The principle of this rule appears to be, that, although the original purpose of requiring notice of dishonour was to enable the parties receiving it to avoid loss, it is more beneficial to the commerce of bills to deny recourse, wherever such notification, or any other step of negotiation, has been neglected, than to allow an inquiry in each case, whether damage has been thereby sustained or not. The same rule, after a similar fluctuation of opinion, has been adopted in England (*b*). It has been held, for instance, agreeably to the doctrine already explained (*c*), both that the drawer must be presumed to have value in the drawee's hands, and that the indorsee has given value to the indorser (*d*); and, in a case betwixt an indorsee and drawer, where the latter pleaded want of notice, the indorsee was not allowed to prove, in answer to the objection, that the drawer had not thereby suffered loss, as his effects were still entire in the drawee's hands; it being laid down, that "the only case in which notice is dispensed with, is where there are no effects of the drawer in the drawee's hands" (*e*). The nature and limits of this exception to the doctrine of notice shall be afterwards considered. There is another apparent exception, viz., that when a bill written on a wrong stamp was indorsed in payment of goods, the indorser was held not to be discharged from the price of the goods, by want of notice of the dis-

Exceptions.

(*a*) In illustration of the old law on the subject, *vide Swinton v. Lady Craigmillar*, 28 June 1706, Morr. 1548; *Brown v. Hume*, 14 Nov. 1705, Morr. 1546; *Yuill v. Richardson*, 25 July 1699, Forbes, 94, Morr. 14996; *M'Kenzie v. Urquhart*, Jan. and Feb. 1731, Morr. 1561, and opinions expressed by some of the judges in *Henderson v. Duthie*, 19 Jan. 1799, Morr. App. v. Bill, p. 9. In support of the doctrine now established, *vide Littlejohn v. Allan*, 12 Dec. 1746, Morr. 1569; *Langley v. Hogg*, 17 June 1748,

Morr. 1574, and cases cited *antea* p. 305, note (*e*). In the first edition these cases were noticed in detail; this has since been deemed unnecessary.

(*b*) Chitty, p. 219, and cases there cited, all of which either establish or imply the necessity of notice.

also cases cited *antea*, p. 305, note

(*c*) *Antea*, p. 305 *et seq.*

(*d*) *Per* Buller, J., in *Bickerdike v. Bolman*, 1786, 1 T. R. 406-9.

(*e*) *Per* Lord Kenyon, in *Dennis v. Morrice*, 1800, 3 Esp. 158.

honour of the bill (a). But this decision proceeded on the ground that there had been no payment, as there was truly no bill. In all ordinary cases, the rule as to notice is absolute. It is a further illustration of the rule, that the decisions already quoted (b), to show that the holder cannot be excused by the failure of the acceptor, or any of the other obligants in the bill or note, are applicable to notice, as well as to any other step of negotiation.

2. Form and Contents of Notice.

No particular form is required in giving notice. But every notification implies, and it is advisable to make it express distinctly, 1st, That the bill or note has been dishonoured by non-acceptance or non-payment, or at least by not being accepted or paid agreeably to its tenor (c); 2d, 'Where a protest is necessary (d),' that it has been in consequence protested; and, 3d, That the holder claims recourse from the party to whom the notice is addressed, for principal sum, interest, costs, and re-exchange (e). These particulars, however, are seldom all expressed, nor is it necessary. For instance, although every notice must import that payment is expected from the person receiving notice, this need not be stated expressly, since the circumstance of the holder giving notice implies that he looks for payment to the person receiving it (f). The same thing is implied even when the notice comes from another person than the holder, as from an indorser, who has got notice, and has a claim of recourse against the person to whom he gives it. Nor must the

What notice should be.

(a) *Cundy v. Marriot*, 1831, 1 B. and Ad. 696.

(b) *Antea*, 305, note (d). See also *Thomson v. M'Ruer*, 20 Jan. 1808, 1 Bell's Comm. 421, n. 5; and *Rohde v. Proctor* (Q. B. 1825), 4 B. and C. 517.

(c) In *Margeson v. Noble*, 2 Chitty, R. 364, notice of non-payment was held sufficient, though accompanied by a statement, that the maker of the note said that he would pay in a week.

(d) 19 & 20 Vict. c. 60, § 13.

(e) *Vide* 1 Bell, 415. 'Mr Bell says, "The notice must at least import, 1.

That the bill (which should be minutely described and identified) was not accepted or not paid; 2. That it was thereupon protested; and 3. That the bill-holder claims, in recourse against the person to whom the notice is given, the sum in the bill, interest, costs, and re-exchange." As will immediately be seen, this requires the notice to be much more specific than the recent English decisions require.'

(f) This appears to be the fair construction of the opinion expressed by the Court of King's Bench in *Tindal v. Brown*, 1 T. R. 167.

notice always bear that the bill or note has been protested; and indeed, in one case (*a*), where it stated expressly that the bill *had not been protested*, the Court held this to mean merely that the instrument of protest *had not been extended*, and that it was still left to be understood that it had been noted.

Insufficient
notices.

But it has been held in England (*b*), that a letter to an indorser demanding payment was not sufficient notice, as it did not state expressly that the acceptor had failed to pay, or even that the bill had been accepted. It has been also decided (*c*), that a letter from the holder's agents, stating that they would take measures to recover payment, if not made, was not sufficient notice, and did not imply that the bill had been dishonoured, which must be intimated, as well as that the holder looks to the party for payment. 'Although this decision has been "universally condemned" (*d*), it still remains the law of England; and on its authority, other decisions, involving equally great hardship, have been pronounced, more especially in the Court of Common Pleas. Thus the following notices were held bad:—"The promissory-note for L.200, drawn by K., dated 18th July last, and payable three months after date, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount forthwith" (*e*). "This to inform you that the bill I took of you is not took up, and 4s. 6d. expense and the money I must pay immediately" (*f*).

Sufficient
notices.

'These decisions having been felt to carry the law too far, very small differences have been permitted to take the case out of their principle; and, indeed, some of the decisions are not at all reconcilable. In the Court of Exchequer the rule was laid down, that the notice was sufficient if it would be inferred from it by any man of business that the bill had been presented to the acceptor, and had not been paid by him, though it should not state so in terms.

(*a*) *Brown v. Dunbar*, 8 Dec. 1807, *Morr. App. v. Bill*, 27.

(*b*) *Per* Abbott, C. J., in *Hartley v. Case* (K. B. 1825), 1 C. and Pay. 555. A rule for a new trial was afterwards discharged, after full argument; 4 B. and Cr. 339.

(*c*) *Solarte v. Palmer*, 7 Bingh. 530; affirmed by the Exchequer Chamber

and House of Lords, 1 Bingh. N. S. 194.

(*d*) *Per* Pollock, C.B., in *Paul v. Joel*, 27 L. J. (Ex.) 380.

(*e*) *Boulton v. Welsh*, 1837, 6 L. J. (C. P.) 243.

(*f*) *Messenger v. Southey*, 13 May 1840, 9 L. J. (C. P.) 278. See also *Caunt v. Thomson*, 14 Feb. 1849, 18 L. J. (C. P.) 125.

On this principle, the following notices were sustained : “ A promissory-note (duly described) became due yesterday, and is returned unpaid. I have to request you will remit the amount, with 1s. 8d., noting ” (a). “ The bill (described) bearing your indorsement has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies overdue and unpaid with me, as above, of which I hereby give you notice ” (b). In another case, a notice to the same effect, but shorter, was sustained. It was in these terms : “ I am instructed by M. to give you notice that a bill (describing it) has been dishonoured ” (c). In these notices (as in many others) it will be observed that there is no direct demand for payment. In a subsequent case, there was neither this demand, nor, what was supposed to be of more consequence, anything implying that a demand had previously been made on the acceptor. The notice simply informed the person addressed that the bill “ was unpaid, and requested his immediate attention to it ” (d). And in the most recent case which appears to have come before the Court of Exchequer, the same liberal principle has been followed ; a notice informing the indorser that the bill was unpaid, and requesting immediate payment of it, having been sustained (e).

‘ In the Court of Queen’s Bench, the decisions have also been less strict than in the Court of Common Pleas. Thus notices in these terms have been held sufficient : “ Your bill (describing it) is this day returned with charges, to which we request your immediate attention ” (f) ;—“ Mr D.’s acceptance for L.200, drawn and indorsed by you, due 31st July, has been presented for payment and returned, and now remains unpaid ” (g) ;—“ A bill (describing it) indorsed by you, lies at etc. dishonoured ” (h) ;—“ We acquaint you with the non-payment of W. M.’s acceptance (describing it), L.50, together with expenses, L.50, 5s. 1d., which remit us in

(a) *Hedger v. Steavenson*, 10 June 1837, 6 L. J. (Ex.) 189.

(b) *Lewis v. Gompertz*, 9 May 1840, 9 L. J. (Ex.) 182.

(c) *Stocken v. Collins*, 30 Jan. 1841, 10 L. J. (Ex.) 227.

(d) *Bailey v. Porter*, 3 May 1845, 14 L. J. (Ex.) 244.

(e) *Paul v. Joel* (affirmed), 8 Feb. 1859, 28 L. J. (Ex.) 143. The notice

was in these terms : “ B.’s acceptance to J. L.500, due 12 January, is unpaid. Payment to Robarts and Co. is requested before four o’clock.”

(f) *Grugeon v. Smith*, 6 Ad. and El. 499.

(g) *Cooke v. French*, 5 May 1840, 9 L. J. (Q. B.) 281.

(h) *King v. Bickley*, 9 June 1842, 11 L. J. (Q. B.) 224.

course" (a). From these decisions, and those of the Court of **Ex-**chequer, the notice seems sufficient if it inform the drawer or indorser that the bill was presented, but not paid, and be expressed in language intelligibly asserting these facts, or from which they may be inferred in any reasonable sort of way.'

Bill or copy
protest need
not accompany
notice.

It is not now held necessary that notice should be accompanied by the bill, or by the principal, or a copy of the protest (b), even in the case of a foreign bill. It does not even seem requisite to mention that there has been a protest, when the person receiving the notice is in this country at the time of the dishonour, as he may then ascertain the fact, though it should not be notified to him (c). But, if he is abroad, the fact of a protest having been taken ought to be mentioned in the notice, since he is not otherwise supposed to be aware of it (d). If he afterwards requires a copy of the protest, it must be sent to him (e).

But the bill
must be speci-
fied.

The notice of dishonour must give such a specification of the bill, as leaves no doubt of its identity. In a case (f), where the

(a) *Everard v. Watson*, 1853, 22 L. J. (Q. B.) 222.

(b) *Cromwell v. Hynson*, 1796, 2 Esp. 511. In this case, where the defendant, the indorser of a foreign bill, was in Jamaica at the time of protesting it for non-payment, one objection was, that notice ought to have been accompanied with a copy of the protest. But Lord Kenyon overruled this, as well as all the other objections. The same objection has been repeatedly overruled in Scotland. In *Johnston v. Murray*, 1 Feb. 1715, M. 1556, it was held to be no objection that the holder had not, on notifying non-payment of a foreign bill, sent the *protested bill* to the drawer to enable him to recover payment from the acceptor. In *Hawkins and Co. v. Cochrane*, 24 June 1757, Morr. 1581, which was an action of recourse brought by the holder against the drawer of a foreign bill on its non-payment, the Court repelled the defence, that the bill and protest had not been sent to the drawer for thirty-nine

days after it was dishonoured, both of them having been sent in the meantime to London, to try whether payment could be got there. A similar decision was afterwards given in *Coutts and Co. v. Nisbet*, 18 Dec. 1760, M. 1586, which was an action by the indorsee against the original payee of a promissory-note, no regard being paid to the defence that the bill and protest had not been sent to the drawer for a month after the date of the protest. In both these cases, if the transmission of the protest, even within a reasonable time, had been held a necessary step of negotiation, recourse must have been refused, it was allowed solely on the ground that such a measure was not indispensable.

(c) *Per* Lord Ellenborough, in *Robt. v. Gibson*, 1813, 3 Camp. 334; 1 and S. 288.

(d) *Per* Lord Ellenborough, *ibid.*

(e) 1 Bell, 415.

(f) *Johnston v. Hogg*, 21 July 174 M. 1570.

indorsee of a bill claimed recourse from the indorser on its non-payment, the Court decided, that the notice was insufficient, as it merely mentioned that the holder had been obliged to draw on him on account of a bill of L.150, the amount of the bill in question, but without specifying the bill, although the draft alluded to in the notice was presented for acceptance. It was held, that the notice ought to be so specific, that the indorser might, on receiving it, have safely attached the drawer's effects for his relief; whereas here, he might have been liable in damages for doing so, as the notice might relate to some other bill with which the drawer had no concern. 'But the description, though it may be incomplete, will be sufficient if it identify the bill. Thus a bill described by the names of the parties, without date or sum, was held to be sufficiently described where it was not said that there was any other bill transaction between them (a). Where there is a misdescription, if it is not such as would mislead the indorser as to the bill intended, the notice is not thereby vitiated (b). Thus, if a mistake be made by describing the document as a note when it was a bill (c), or by describing the drawer as acceptor (d), or by mentioning a wrong bank as the place where it was due (e), the indorser will not be allowed to escape liability if it be shown that he could not have been misled.'

When the drawee offers only a partial or conditional acceptance, or when acceptance *supra* protest is offered, which the holder does not choose to take unconditionally, notice of it ought to be given to the drawer or indorsers, to preserve recourse against them on the bill, so far as the acceptance is not in terms of it. But even neglect to give such notice is obviated when the condition of the acceptance is fulfilled, as it then becomes an absolute acceptance (f). The notice ought to specify the kind of acceptance offered; because, if it is merely a general notice of non-acceptance, it will be presumed that the holder refuses it (g). Although no notice of such an acceptance

Notice of varying acceptance.

(a) *Shelton v. Braithwaite*, 19 Jan. 1841, 10 L. J. (Ex.) 218.

(b) *Bromage v. Vaughan*, 16 Jan. 1846, 16 L. J. (Q. B.) 10.

(c) *Stockman v. Parr*, 15 June 1843, 12 L. J. (Ex.) 415.

(d) *Mellersh v. Rippen*, 21 April 1852, 21 L. J. (Ex.) 222.

(e) *Bromage v. Vaughan*, *supra*, note (b).

(f) Bayley, 254.

(g) In *Sproat v. Matthew*, 1 T. R. 182, where the holder of a bill, on being offered a conditional acceptance, had noted the bill for non-acceptance, this was held to imply a

should be given, the drawer and indorsers will be bound to the extent of the acceptance (*a*). If any person, whether drawee or not, accepts for honour, either of the drawer or of an indorser, he must intimate his acceptance under protest, and send the instrument of protest to the person for whose honour he accepts, if he means to preserve his recourse against him (*b*).

Notice of orders not to pay.

In a case where the holders of a bill, being bankers, were agents both for the drawers, whom they had credited with the bill in their account, and for the acceptors, and where the bill was made payable at their bank, it was decided, that, though the acceptors had sent them orders not to pay it, they were not bound to communicate these confidential orders to the drawers, but that their recourse would be preserved by a general notice of non-payment (*c*).

3. *How Notice communicated.*

Notice may be verbal or in writing;

It is not necessary that notice should be in writing, although this appears to be the practice in Scotland, even where both parties are neighbours (*d*). Verbal notice has been repeatedly held sufficient (*e*). Thus, where the cashier of a bank had received notice of the dishonour of a bill by a letter from London, it was held sufficient that he had given verbal notice to the parties from whom recourse was claimed, by showing them the letter (*f*). In another case (*g*), though the point was not decided, the Court held, that verbal intimation, when proved, was sufficient; and (*h*), when

rejection of the acceptance. The same principle seems applicable to notice. The rule is so laid down by Bayley, 254.

(*a*) Chitty, Bayley, 254.

(*b*) Beawes, No. 34; *antea*, Sect. iii.

(*c*) *Crosse v. Smith*, 1813, 1 M. and S. 545.

(*d*) *Vide* Report of Sir William Forbes and Co. and of Mansfield, Hunter, and Co., in *Colebrooke v. Douglas*, 18 July 1780, Morr. 1605; the substance of which report is, that, where the parties are neighbours, they generally give notice by a card, which is not entered in the letter-book, ex-

cept in cases requiring peculiar caution.

(*e*) *Mill v. Salkeld*, 12 Nov. 1805, H. 54; *M'Cartney v. Hannah*, 11 Feb. 1817, H. 76.

(*f*) *Colebrooke and Co. v. Douglas*, note (*d*). Prof. Bell (1 Comm. 41 note 2) states that this case was affirmed on appeal; but no trace of the case appears to have been found in the Lords' Journals, 3 Pat. App. 682.

(*g*) *Stirling Banking Co. v. Duncan's Representatives*, 20 Feb. 1784, Morr. 1611.

(*h*) *Syme v. Ferguson*, 25 June 1813, F. C.

the Lord Ordinary had restricted the party claiming recourse to a proof of notice by letter, the Court remitted to allow a proof at large, being "clearly of opinion that it was not necessary to intimate the dishonour of a bill in writing." The same doctrine is settled in England (*a*). In one of the cases now cited, relating to a Scotch inland bill (*b*), where an execution of horning was produced, which bore that a charge had been given to the indorser's representative within the proper period for notice, but was afterwards reduced as irregular, it was decided, likewise, that it could not be evidence even of notice, there being no proof of a charge independent of it.

It is not necessary that notice should be received personally by the party concerned; it is sufficient, if he is a merchant or banker, that verbal notice be left at his counting-house or place of business, or, if he is not in trade, that it be left at his dwelling-house (*c*). It has been decided in England, that, if the holder sends to a merchant's place of business, within ordinary business hours, to give notice to him verbally, and no person can be found there, it is not necessary to deliver any message to a servant, or to leave a written notice, as every merchant should have some person at his place of business capable of receiving notice (*d*). His failing to do so has been held a refusal of payment (*e*). It is therefore not necessary,

and may be delivered to the indorser personally, or left for him.

(*a*) *Crosse v. Smith*, 1813, 1 M. and S. 545, and *Goldsmith v. Bland*, 1800, Chitty, 319. Both cases shall be immediately stated with reference to another point.

(*b*) *Stirling Banking Company v. Duncanson's Representatives*, 20 Feb. 1784, M. 1611.

(*c*) *Housego v. Cowne*, 15 Jan. 1837, 6 L. J. (Ex.) 110, where a verbal message left with a wife was held sufficient; *Metcalfe v. Richardson*, 11 C. B. 1011.

(*d*) *Goldsmith v. Bland*, per Lord Eldon, at Guildhall, Chitty, 319. In this case the plaintiff's clerk, being sent, during business hours, to the defendant's counting-house, to give notice, was told by a servant-girl that

there was nobody in the way, and left no message. Yet it was held that enough had been done to give notice.

(*e*) *Crosse v. Smith*, 1 M. and S. 545, per Lord Ellenborough. In this case, where a clerk, on being sent to the counting-house of a company to give verbal notice, found it shut betwixt 10 and 11 A.M., it was held that enough had been done to give notice. No notice was sent to the house of any of the partners, though one of them resided ten miles, and another only one mile from Hull, where their place of business was. Similar doctrine was held as to the sufficiency of calling at a counting-house during business hours to give notice, though the counting-house was shut, by Bayley, J., in

in such a case, to send notice to his residence (a). It has been held, however (b), that intimation by a servant that she did not know where the party was, did not excuse the want of notice. But the case turned ultimately on another point. Notice to an attorney will be of no effect, unless he has special powers from his constituent (c).

Notice sent by post.

Although verbal notice, if proved, does not appear to be excluded, even when the parties reside in different places, it is most convenient, in such a case, to send notice by letter. The post being the authorized channel for transmitting letters, it is in all cases safest to send them by it. If it is proved that a letter containing notice was put into the post-office properly addressed, but only in that case (d), this will be sufficient to preserve recourse, whether the letter has been delivered or not (e). The same rule is applicable, in London, to letters of notification put into the post; it being

Bancroft v. Hall, 1816, Holt, 476. In *Bowes v. Howe*, 1813, 16 East. 112, Lord Ellenborough expresses an opinion, that the shutting up of a counting-house during business hours was a refusal to pay, and, on that ground, the Court of King's Bench held, that the presentment of particular notes for payment was unnecessary. But their judgment was reversed by the Exchequer Chamber, who held, that there was no refusal to pay these particular notes, and that they could not be considered as dishonoured till they were presented. But, if they had been presented, the circumstance of the counting-house being shut would, as in the case of a clerk calling to give notice, have been held to supersede the necessity of doing anything else.

(a) *Crosse v. Smith*, 337, note (e). It is now held in England, that the proper view to take of the law where the holder finds the indorser's place of business shut during business hours, is not that the former has given sufficient notice, but that the latter has dispensed with notice; *Allen v. Edmundson*, 1848, 2 Exch. 719.

(b) *Harris v. Richardson*, 4 C. and Pay. 522.

(c) *Crosse v. Smith*, 337, note (c).

(d) *Smith v. Tarries*, 9 June 1813, H. 79; *Milligan v. Barbour*, 27 Feb. 1829, 7 S. 489. In *Walter v. Haynes* (N. P.), 1 R. and M. 159, Abbott, C. J., held it not sufficient to prove that a letter of notice had been put into the post-office, addressed "Mr Haynes, Bristol," such an address to a place like Bristol not being sufficiently specific. But the plaintiff had a verdict, on bringing other evidence to prove that the defendant had received the letter. Vide on this subject, *Henderson v. Duthie*, post, 355. In an English case, *Mann v. Moors* (N. P.), 1 R. and M. 249, where the drawer of a bill had dated it "Manchester," Abbott, C. J., held, that a letter addressed to him, "Mr Moors, Manchester," was correct in its address, because, by dating the bill "Manchester," he raised a presumption that a letter so addressed to him would reach him.

(e) This was decided in England, *Sanderson v. Judge*, 1795, 2 H. 509; and recognised in *Parker Gordon*, 1806, 7 East. 385. The same doctrine was held by Lord Kenyon in *Kufh v. Weston*, 1799, 3 Esp. 5, where it was found sufficient, that

held that putting them into it in due time is sufficient as to parties residing within the limits of that post, whether the letters reach them or not (*a*). It will also be sufficient, in Edinburgh, to put such letters into the post (*b*). The post-mark will be held good evidence of the letter being put into the post-office, and of the date of putting it in (*c*).

If a person sends notice by a private hand, when he might have the benefit of the post, it would seem, though the point has not been expressly decided, that he thereby takes on himself the risk of irregularity in the conveyance, since he is blameable for not adopting the most secure conveyance (*d*). At least, if the conveyance arrive much later than the post, the delay must rest with him (*e*). It is difficult to lay down a precise rule as to the extent of delay in the arrival of a private conveyance which will nullify the notice, although such delay as prevents the person getting notice, even for one post, from sending advice to his correspondent, will probably be

Notice by private messenger or conveyance.

letter notifying non-acceptance had, with the protest, been put in due time into a post-office in Italy, though the course of post had been retarded.

The rule now stated was recognised by the Court of Session in *Stewart v. Wright*, 13 Dec. 1821, 1 S. 213, where the dishonour of a bill was found to be sufficiently notified by putting a letter of notification into the post-office, though the party to whom it was addressed denied that he had received it.

(*a*) This doctrine was held, among a number of other points, in *Scott v. Lifford*, 1808, 1 Camp. 246, per Lord Ellenborough. The same thing was held by Lawrence, J., in *Hilton v. Fairclough*, 2 Camp. 633, where the putting of a letter into the twopenny post in due time was found sufficient; also in *Dobree v. Eastwood*, 3 C. and Pay. 250; *Stocken v. Collin*, 30 Jan. 1841, 10 L. J. (Ex.) 227; and *Woodcock v. Houldsworth*, 19 Nov. 1846, 16 L. J. (Ex.) 49.

(*b*) 1 Bell, 416.

(*c*) Per Lord Ellenborough, in *Arcangelo v. Thomson*, 2 Camp. 622. The

question here related to the transmission of an order to effect a policy of insurance, which was held to be proved by production of a letter from the place whence the order was transmitted, bearing the English ship-letter post-mark, 1797. The marks, however, do not prove themselves, but must be sworn to by post-office clerks, or others having knowledge of the various contractions, etc., used. *Woodcock v. Houldsworth*, note (*a*).

(*d*) There is a decision (of which the author could not have been aware, as the report of it was not published when he wrote) confirming the doctrine stated in the text, viz., *Brown v. Kerr*, 14 June 1809, H. 62.

(*e*) This doctrine may be gathered from the opinion expressed in *Darbishire v. Parker*, 1805, 6 East. 12, 13. In that case, the person claiming recourse, having himself got notice on 12th June, sent it to the defendant on the 13th, not by post, but by a private hand, which arrived two hours later than the post, but an hour before the departure of the post, from the place of arrival, for London. It was held,

fatal (*a*). It would likewise appear, that in such a case the holder must prove the safe arrival of the letter (*b*). But when a person, instead of sending notice directly by post, writes to a correspondent on the spot to give notice, and that correspondent goes to the defendant's warehouse for this purpose, sooner than a letter could have reached him by post, but is prevented by finding the warehouse shut during business hours, the defendant cannot plead the lateness of the notice (*c*). Further, if it is necessary to send notice by a special messenger, as where the party receiving it lives out of the course of the regular post, the expense of such notice will be allowed (*d*); and the person giving it will not be responsible for the accidental delay of the conveyance, as he could not have employed any other. When notice is to be sent abroad, to a place to which there is no post, it is sufficient to send it by the ordinary conveyance, as by the first regular ship bound to that place; and it will not be an objection that it has not been sent by a ship bound elsewhere, but which accidentally touched at the place for which the notice was intended, before the arrival of the regular ship (*e*).

4. *Proof of Notice.*

Burden of
proof.

The burden of proving due notice always lies on the party suing for recourse, and the proof must be such as leaves no room for doubt or conjecture (*f*).

What sufficient
proof.

'It is a jury question, what is sufficient evidence of intimation (*g*); and all proof which would be admitted to prove any other ordinary fact is here admissible (*h*). It is, therefore, a question

that the late arrival of the notice had prevented the drawer, who got it, from writing to London, where the drawee lived, till the next post. Lord Ellenborough, at the trial, was of opinion, that the notice had been sent in sufficient time. But, the other Judges being of a different opinion, a rule was granted for a new trial.

(*a*) *Vide Darbishire v. Parker*, 339, note (*e*).

(*b*) *Brown v. Kerr*, 14 June 1809, H. 62.

(*c*) This was ruled, under circum-

stances similar to those now stated, Bayley, J., in *Bancroft v. Hall*, 18 Holt, 476.

(*d*) *Pearson v. Crallan*, 1805, Smith, 404, per Lawrence, J., affirmed by the Court of King's Bench.

(*e*) This was decided in *Muilman v. D'Eguino*, 1795, 2 H. Bl. 565.

(*f*) *Lawson v. Sherwood*, 1 Stark 314.

(*g*) *Stock v. Aitken*, 14 Nov. 1846, 9 D. 75.

(*h*) *Syme v. Ferguson*, 25 June 1813, F. C.

of circumstances in each case, whether the proof is sufficient. In this view precedents are of little value, but those cited may be taken as illustrations.' In an English case (a), regarding the transmission of a licence, it being proved to be the invariable course of the plaintiff's house, that the clerk who copied any licence sent it off by post, and made a marking on a copy of the licence that he had done so; and a copy of the licence in question being produced from the plaintiff's letter-book, in the handwriting of a deceased clerk, with a memorandum also by him bearing that he had sent it; this was held sufficient evidence, with the testimony of a person who knew the plaintiff's mode of doing business, that he had no doubt the licence was so sent. In another case (b), it was held not sufficient, that the plaintiff had written a letter notifying dishonour to the defendant, which was put on a table where, by the usage of the house, post-letters were always deposited, and thence carried by the porter to the post-office, as the porter was not called. But it was held, that it would have been enough if the porter had been called, and had said that he invariably put all letters deposited on the table into the post-office, though he could not remember this letter. It was afterwards held, in the same case, to be sufficient *prima facie* evidence of notice, that the defendant, in a letter to the plaintiff, acknowledged receipt of a letter from him of the same date with that in question, though without mentioning its contents. The defendant had had notice to produce the principal letter, and therefore, as he did not produce it, the presumption was, that it was a letter of notice. A similar rule, as to the effect of evidence of regularity of practice in putting-letters of notice into the post-office, was adopted in two recent Scotch cases (c), where the evidence of notice was found sufficient. In the last of these cases, there was a marking of intimation on the bill, and the letter of notice was entered in the letter-book; but these articles of evidence were wanting in the other case. 'It seems that there is no uniform practice of entering such notices in the letter-book, and it is clear there is no necessity for doing so (d). It is not even neces-

(a) *Hagendon v. Read*, 3 Camp. 379, *per* Lord Ellenborough.

(b) *Hetherington v. Kemp*, 4 Camp. 193, *per* Lord Ellenborough.

(c) *Sandeman v. Thomson*, 12 Nov. 1831, 10 S. 4; *Robertson v. Gamack*,

1 Dec. 1835, 14 S. 139.

(d) *Stock v. Aitken*, 14 Nov. 1846,

sary to make any memorandum at the time of the letter having been sent (*a*); but it is always advisable notwithstanding to enter in the letter-book, as, if that be done, very slight supplementary proof is required (*b*), more especially after a lapse of time from the occurrence (*c*). Such an entry has been found very useful where the evidence of the sender has been lost (*d*). In a case (*e*), where it was proved, that on the day of the dishonour of a bill, the witness had, by the plaintiff's desire, compared two papers, one of which being produced, was a notice of dishonour, and that the witness had afterwards carried to the post-office a letter from the plaintiff to the defendant, but of which he did not know the contents, this, with the proof of a notice to the defendant to produce this letter, was held to be sufficient evidence, since the defendant might have shown, if he could, by producing the letter, that it was not a letter of notice.

What insufficient proof.

It has been held, however, in England, not to be sufficient evidence of notice, that one of the holder's clerks deponed that the letter of notice was put into the post-office on a certain day, but could not say whether this was done by himself or by another clerk (*f*). In another case, where the practice of the holder's office was, that a clerk, after copying letters into the letter-book, gave them to his master to seal, and afterwards, he or another clerk carried them to the post-office; but there was no place of deposit in the office for such letters, and neither clerk could speak to the letter in question, though they swore that they carried to the post-office all letters which were given them, it was held that an entry in the letter-book, of the letter in question, in the clerk's writing, could not be read as proof of the letter having been sent (*g*).

9 D. 75. In this case, the evidence of one clerk, deponing that he had written and posted the notice, and of two others, that it was invariable practice to do so, was held sufficient.

(*a*) *Hamilton v. Spowart*, 3 June 1813, H. 73.

(*b*) *Galbraith v. Warden*, 5 Feb. 1820, H. 79; *Alexander v. Wood*, 20 Nov. 1735, Elchies, No. 8, *v. Bill*.

(*c*) *Hotchkis v. M'Whirter*, 19 May 1797, H. 41.

(*d*) *Stewart v. Wright*, 13 Dec. 1811, 1 S. 213.

(*e*) *Roberts v. Bradshaw*, 1815, Stark. 28.

(*f*) *Hawkes v. Salter*, 4 Bingh. 715; 1 M. and Pay. 750. In *Nelson v. Dinwoodie*, 26 Feb. 1830, 8 S. 605, a somewhat similar decision was given.

(*g*) *Toosey v. Williams*, 1 M. and Malk. 129.

A letter from the defendant, dated six days after notice should have been given, but implying that notice had been received, was held to prove that there was due notice (a). But a statement by the defendant to a third party that he received a letter of notice too late, has been held no evidence of due notice, as the whole statement must be taken together, and proved that there was not due notice (b).

Admissions by
defender.

As to the question, whether the defender should have notice to produce the principal letter of notice, in order to render secondary evidence of it admissible, the English authorities do not seem to be uniform. On the one hand, it has been held, that in this case, as well as in all cases of evidence regarding letters, notice must be given to produce the principal letter, as the best evidence, before secondary evidence can be received (c); and further, that not only the fact of notice, but the date of sending it, is material in such a case, and that this might appear from the post-mark on the principal letter (d). On the other hand, it has been decided (e), that a witness might be allowed to prove that he had left a written notice at the defendant's house without notice to him to produce it; and also (f), that a paper bearing to be a notice of dishonour, and which was proved to have been compared, on the day of the dishonour of the bill, with another paper, might be read, without notice to the defendant to produce that paper. In a later case (g), the Court of Common Pleas, after consulting with the other Judges, decided, that a copy notice of dishonour made at the time may be given in evidence, without notice to produce the original. In this case, it was held, that a copy made at the time of writing the principal, and proved on oath, was equivalent to a duplicate original. Several of

Must the
defender have
notice to
produce the
principal
letter?

(a) *Booth v. Jacobs* (K. B. 1834), 3 Nev. and Man. 351.

(b) *Braithwaite v. Colman*, 4 Nev. and Mann. 654.

(c) *Shaw and Others v. Markham*, Peak's C. N. P. 165, per Lord Kenyon. In *France v. Lucy*, 1 R. and M. 341, Best, C. J., refused to allow parole evidence of the contents of such a letter of notification, on the ground that there had been only a notice to produce all letters relative to the bill, without specifying this letter.

(d) *Langdon v. Hulls*, 1804, 5 Esp. 156, per Lord Ellenborough.

(e) *Ackland v. Pearce*, 1811, 2 Camp. 600, per Le Blanc, J.

(f) *Roberts v. Bradshaw*, 1815, 1 Stark. 29, per Lord Ellenborough. His Lordship's opinion in this case seems to be different from that which he expressed in *Langdon v. Hulls*, note (d).

(g) *Kine v. Beaumont*, 1822, 7 Moore, 119.

these later decisions appear to have been influenced by some peculiarity of the English law regarding all notices, *e.g.*, notices to quit possession; it being held, that these may be proved without a requirement on the defendant to produce the principal notice, which rule has been applied also to notices of dishonour (*a*). Whether this rule, or the principle of the earlier cases, viz., that everything possible should be done to procure the best evidence, before admitting secondary evidence, is most applicable in Scotland, cannot yet be determined. Our forms of proceeding hitherto have obviated any inconvenience arising from the production of secondary evidence first, because the other party has always an opportunity afterwards to produce the principal document. The question will not properly arise, till an attempt is made to lead such secondary evidence at a trial, without notice to the defendant to produce the principal letter, thus depriving him of all opportunity to disprove the secondary evidence. It may be doubted whether, in such a case, the pursuer or charger could be held to have done everything in his power to procure the best evidence (*b*).

In all other respects, the proof of notice, whether verbal or written, appears to be subject to the rules established in Scotland as to parole or written evidence generally.

5. Time for giving Notice.

(1.) Day when notice should be given.

The day for notice of non-acceptance or non-payment,

Although it is not necessary for the holder of a bill to present it till the term of payment, in which case one protest, viz., for non-payment, and a notice of non-payment to the drawer and indorsers, will be sufficient, yet, if he does present it for acceptance, notice of non-acceptance must be given to the other parties as soon after acceptance is refused, as it is given, in the other case, after a refusal of payment (*c*). The neglect of this, however, if it does not appear

(*a*) Compare *Ackland v. Pearce*, 2 Camp. 600, with *Jory v. Orchard*, 2 Bos. and Pul. 39, regarding the general law applicable to all notices. In England the more recent cases are now regarded as having conclusively overruled the older; Chitty, p. 416.

(*b*) Vide cases in Chitty, p. 416, and particularly *Nauze v. Palmer*, 1 M. & M. 31, and *Affalo v. Fourdrinier*, 1 M. & M. 335, and 6 Bingh. 306, and *Bevans v. Waters*, 1 M. & M. 235, points relative to those now discussed.

(*c*) *Banks v. Scott*, 13 Nov. 1858.

ie of the bill, will afford only a personal objection against the guilty of it, and cannot be pleaded against a third party who the bill *bona fide* before the term of payment, and himself negotiates it (a).

is now to be considered within what time, after non-acceptance payment, notice of either ought to be given. 'In Scotland of both inland and foreign bills, is the same; were different rules on this subject as to foreign and inland

Formerly in Scotland the holder of an inland bill was d fourteen days within which to give notice of dishonour (b); his latitude being singularly inconvenient, and differing en- from the law of England, the Mercantile Amendment Act (c) d that notice of dishonour of *any* bill or note should be given same manner, and within the same time, as was required in se of foreign bills. As the law of England (and also of Ire- has always been the same in regard to both inland and foreign and is the same as our old law in regard to foreign bills, the of the Mercantile Amendment Act has been to make the law, ard to the time of giving notice of dishonour, the same within nited Kingdom in regard to all manner of bills and notes.'

he rule as to foreign bills ('now applicable, accordingly, to and must be within a rea- sonable time. l bills also') depends, both in Scotland and England, on the n of merchants (d), and, when expressed in general terms, is,

; *Miln v. Erskine*, 10 Feb. 1710, 51; Forbes, 97. In *Goodal v.*, 1787, 1 T. R. 712, it was laid that if a bill is presented for ance, and acceptance refused, of non-acceptance must be im- ely given, to preserve recourse. *ard v. Hirst*, 1770, 5 Bur. 2670, lder of an inland bill, which en presented for acceptance and l, was found to have lost his e by not giving notice of non- ance till after the term of pay-

The same doctrine is laid down d Ellenborough in *Orr v. Magen-* 06, 7 East. 362. In *Roscow v.*, 1810, 2 Camp. 464, 12 East. here the holder of a bill had no notice to an indorser of its ceptance till after it had been se presented for payment, which

was refused, his recourse was held to be thereby cut off, so that the in- dorser, who had, notwithstanding, paid the bill and taken a re-indorsement, was found to have done so in his own wrong, and could not have any claim against the other parties.

(a) *O'Keefe v. Dunn*, 1815, 1 Marsh. 613; 1816, 5 M. and S. 282.

(b) 12 Geo. III. c. 72.

(c) 19 & 20 Vict. c. 60, § 14.

(d) The Act 12 Geo. III. c. 72, while it established the peculiar rule above stated, as to the time for notifying the dishonour of inland bills, did so, "without prejudice to the notification of the dishonour of foreign bills, to be made within such time as is required by the usage and custom of mer- chants."

that notice of refusal to accept or pay must be given within a reasonable time after refusal. What is a reasonable time, depends in good deal on the circumstances of each case. In England, it has been held, though the point has excited much discussion, that these circumstances, such as the distance of the parties from each other, the course of post, and, in short, all facts touching the question of notice, ought to be left to the jury; but that, when they have been found, the inference to be drawn from them, as to the reasonableness of the time within which notice has been given, is a question for the Court (a).

Review of
Scottish
decisions.

In Scotland, as well as in England, there appears to have been at first no definite rule as to the proper time for giving notice, as may be inferred from the fact, that it was pleaded, in one case (b), to be due negotiation of a bill protested in September, to notify its dishonour in April following; and in another case (c), where a bill had been protested on 2d June, that it was sufficient to notify its dishonour in December following; for, although recourse was held to be cut off in both these cases, the mere statement of such pleas shows that there was then no fixed rule as to the time of notification. It has been laid down more recently (d), that the dishonour of bills ought to be notified within three posts, after it takes place; and the statement implies that such notification would be sufficient. This opinion was recognised as the ground of decision in a case (e), where the Court, holding the rule with regard to foreign bills to be, that their dishonour should be notified within three posts, decided, on that ground, that notification on the fifth day was insufficient to preserve recourse. But that opinion has been since judicially held erroneous (f), and is now disregarded. There does not appear to have

(a) Chitty, p. 484, and *per* Lord Mansfield, in *Tindal v. Brown*, 1786, 1 T. R. 167. Ashurst and Buller, *contra*, held the reasonableness of notice to be altogether a question of law. In *Darbishire v. Parker*, 1805, 5 East. 12, 13, Lord Ellenborough and Grose, J., appear to have considered this as a question compounded of law and fact; Lawrence and Le Blanc, J., held it to be a question of law. In *Scott v. Lifford*, 1808, 9 East. 371, Grose, J., says, that "due diligence is a question

of law, but judges may take the opinion of a jury as to what is convenient in the manner of giving notice."

(b) *Ferguson v. Malcolm*, 12 Jul 1729, M. 1559.

(c) *Adam v. Dick*, 24 Feb. 1737, 1563, Elchies, *v. Bill*, No. 15, where it is said to have been protested seven days after the term of payment.

(d) Ersk. iii. 2, 33.

(e) *Reynolds v. Syme*, 4 Feb. 1771, M. 1598.

(f) *Vide* the opinion expressed

been any express decision since in Scotland as to the time for intimating the dishonour of foreign bills, although the Court (*a*) is said to have expressed an opinion that notice ought to be given by the *first* post.

'The only recent Scottish case (*b*) has been that of an inland bill where the parties were both resident in the same place. The bill was dishonoured on a Saturday, and the notice was delivered at the indorser's premises on the following Monday. It was here held without difficulty, that the notice was sufficient. In the opinion given by the Court, the following statement of the law by Professor Bell (*c*) was quoted with approval:—"In England, so far as any rule of law appears to be fixed, it would seem that to such of the parties as reside in the same place, the notice must be given, at furthest, by the expiration of the day following, but not necessarily on the day on which the dishonour is known; and if that be a Sunday, it is the same as if the arrival were on a Monday. . . . That, if the proper day of notice be a day of public rest, or of similar sanctity, according to the religion of the person bound to give notice, it will be sufficient on the following day. Probably these rules would be followed in Scotland as grounded in sound discretion and mercantile usage."'

Dott v. Mackenzie.

In the absence of other Scotch decisions, those pronounced in England, as they proceed on the same principles which we recognise, deserve attention.

English decisions.

1. It appears to be settled, both in Scotland and England, that,

Notice may be on last day of grace.

the Court in *Carrick v. Harper*, 23 May 1790, M. 1614.

(*a*) *Ibid.* In *Batchin v. Orr*, 1792, M. 1619, H. 33, where a foreign bill was returned dishonoured on 27th June to an indorser who did not send off (post) intimation till the 30th, it was held, (1) that the delay was unreasonable; and it was further held, (2) that the delay was not excused by the indorser having been from home, it having been his duty to leave some in charge to open his letters and attend to his bills. It is doubtful if this case would now be followed on the second point, a somewhat different decision having been pronounced in

England, in *Shelton v. Braithwaite*, 26 Dec. 1841, 11 L. J. (Ex.) 54, where it was held, that an indorsee who left his place of business for some days, leaving directions that notices were to be forwarded to him, and who consequently gave a notice a day later than he should otherwise have done, was not guilty of laches, and that the notice was accordingly good. See, however, *Turner v. Leach*, referred to, p. 349, n. (*b*).

(*b*) *Dott v. Mackenzie*, 18 July 1861, 23 D. 1310.

(*c*) 1 Bell's Com. 417. See also *Clarkson v. Ball*, p. 348, n. (*f*).

if the drawee refuses payment on the bill being presented to him at any period of the last day of grace, its dishonour *may* be notified at that day (a). A protest may be taken under these circumstances and consequently it is equally competent, under similar circumstances, to give notice (b). 'It has been held that notice may be given on the day the bill falls due, even though the non-payment may have occurred from mere neglect and not distinct refusal (c).'

Time of notice
when parties in
same place.

2. If all parties live in the same place, each party has a day to give notice to the person immediately before him on the bill. This rule has been settled in England, after much discussion, on the strongest grounds of expediency; it being held unreasonable that a party in business should be obliged to lay aside all his other business to notify the dishonour of a particular bill at the earliest moment (d). But it is required, in such a case, that the letter of notice should be put into the post-office before the second day's post goes out, so that it may reach the person to whom it is addressed by that post (e).

Notice by last,
to prior,
indorsers.

3. Each indorser has a day after receiving notice, but under the limitation now mentioned, to give notice to the preceding indorser (f). If, however, any one of them delays more than

(a) The doctrine was expressly held by the Lord Chancellor, in *Moline, ex parte*, 19 Ves. 216; *Burbridge v. Mannors*, 1812, 3 Camp. 193.

(b) *Antea*, p. 315.

(c) *Clowes v. Chaldecott*, 26 Jan. 1829, 7 L. J. (O. S.) K. B. 147.

(d) *Per* Ellenborough, in *Darbishire v. Parker*, 1805, 5 East. 9; *Smith v. Mullett*, 1809, 2 Camp. 208; and *Marsh v. Maxwell*, mentioned in a note to this case. In *Scott v. Lifford*, 1808, 1 Camp. 246, 9 East. 347, where a bill was presented for payment on 4th June, returned to the plaintiff dishonoured on the morning of the 5th, and the latter put a letter of notice for the defendants into the post on the 6th, the jury, on these facts being left to them by Lord Ellenborough, to determine whether there had been sufficient diligence, found for the plaintiff, and a rule *nisi* for a new trial was refused.

The doctrine was recognised in *Hicks v. Shepherd*, 1796, 6 East. 14; and *Jameson v. Swinton*, 1810, 2 Camp. 373.

(e) In *Fowler v. Hendon*, 4 Tyrrel 1002, where a plaintiff was bound to have given notice, so that it should reach the defender on 7th November. it was held not enough that he put a letter of notice into the post on that day, without also proving that it reached the defendant that day. *See also Poole v. Dicus*, C. P. 1835, 1 Bingh. N. S. 649. In *Smith v. Mullett*, note (d), a plaintiff, who got notice on Monday, and did not send a letter to the preceding indorser (who also lived in London) till after post hours on Tuesday, so that it was not delivered till Wednesday, was held (by Ellenborough) to be guilty of *laches*, and non-suited.

(f) This was held by Lawrence, J. in *Jameson v. Swinton*, note (d). To

day to give notice to his indorser, he will be considered guilty of laches (a), and cannot plead in excuse, that, by other indorsers taking less than a day, there was not more time consumed on the whole than would afford a day to each (b).

Moreover, *the holder* giving notice to the first or any prior indorser, must give it to him in a day, as well as to the last indorser (c). In the case, however (d), of a shipmaster, who had drawn a bill on his employers, as their agent, for the price of a cargo of wood which he had bought for them, they having refused to accept or pay without notice to him, and he being arrested for it abroad, several years afterwards, and having paid it, he was found entitled to claim indemnity from them, though he did not prove that the dishonour of the bill had been notified to him; it being held, that, as he was identified with them as their agent, or, if not, as he drew without authority, it was doubtful, in either case, whether he was entitled to notice, or, though he were, that they were to blame, for not having intimated to him their non-acceptance, or told him what he should do if the bill was claimed from him.

Notice by holder to prior indorsers.

4. When the parties reside in different places, as well as when

Notice when parties in different places.

same rule seems to have been also adopted in a Scotch case, *Clarkson v. Ball*, 17 Nov. 1831, 10 S. 17.

(a) In *Miers v. Brown*, 22 May 1843, 12 L. J. (Ex.) 290, a party who got notice on Monday, and did not give notice till 11 o'clock on Wednesday morning, was held too late.

(b) In *Marsh v. Maxwell*, 348, n. (d), Lord Ellenborough said, "It is not enough that the drawer and indorsers received notice in as many days as there are subsequent indorsees, unless it is shown that each indorsee gave notice within a day after receiving it, as, if any one has been beyond the day, the drawer and prior indorsers are discharged." The rule was enforced in *Smith v. Mullett*, 348, n. (d), though the defendant, from two of the indorsers having given notice to the parties immediately before them in one day, had received notice in a shorter time on the whole than would

have been required, if each indorser had taken a day after receiving notice. In *Turner v. Leach*, 1821, 4 B. and A. 451, where an indorser, who got notice on the 4th of September, did not give it till the 8th (having left town on the 1st and not returned till the 8th, on account of his wife's illness, which, however, was held to be no excuse, as he ought to have had some person to attend to his business), it was found to be no defence to him against his indorser, that the same time would have elapsed if each of the intervening indorsers had taken a day to give notice, it being held that *his party* was discharged simply by *his own neglect* to give due notice, without reference to the other parties.

(c) *Dobree v. Eastwood*, 3 C. and Pay. 250, confirmed by *Rowe v. Tipper*, 27 Jan. 1853, 22 L. J. (C. P.) 135.

(d) *Huntly v. Sanderson*, Ex. 1833, 1 Cr. and Meas, 466.

they reside in the same place, it will be sufficient if a party gives notice, by the post of the day following that on which he receives it, or on which he is otherwise aware of the dishonour; it being held, as in the case of parties residing in the same place, that he is not bound to neglect all his other affairs, in order to give notice by the first post (a). It seems to have been held at one time, that in such a case notice should be sent, if practicable, by the first post; and that this could not be dispensed with, unless the post sets out so early after the notice arrives as to render it impracticable (b). But the obvious inexpediency of inquiring, in each case, whether this was practicable from the party's occupations, or other causes, has led in England to the establishment of the foregoing rule. It would probably be followed in Scotland.

(a) In *Darbishire v. Parker*, 1805, 6 East. 12, 13, it was held, that a party who got notice by post on the 12th, would have used sufficient diligence if he had sent notice to another party by the post of the 13th. But the Court did not, in that case, lay down a general rule. In *Williams v. Smith*, 1819, 2 B. and A. 496, Abbott, C. J., in giving the opinion of the King's Bench, lays it down that the time for giving notice is "the departure of the post on the day following that in which the party receives intelligence of the dishonour." In *Bray v. Hadwen*, 1816, 5 M. and S. 58, where a party who got notice by post about half-past 8 A.M., had, instead of sending notice to another party by that day's post, which set off at 12 noon, delayed it till next day's post, the Court of King's Bench, per Lord Ellenborough, held it to be fixed since *Darbishire v. Parker*, and constantly recognised at Guildhall, that each party had a day to give notice, and the plaintiff was therefore found to have given due notice. In *Wright v. Shawcross* (2 B. and A. 501, note), it was held sufficient for a party who had got notice on Monday morning to send it to another party by the Tuesday's post. In the case of a check presented to a

banker by a customer, with direction to place it to his account, the banker on resolving to return it, was held excused by giving notice by letter next day; *Boyd v. Emmerson*, K. B. 1855, 2 Ad. and Ell. 184. In another case *Geill v. Jeremy*, 1 M. and Malk. 61, the holder was not held bound to send notice by the first post, though, in consequence of there being no post on the day following, the notice was thus not sent till the third day. In *Dey v. Slater*, 4 C. and Pay. 200, a bill belonging to bankers in Paris, being dishonoured in London, it was held, that their London correspondents were entitled to send it to them; but 2dly. That, when it was returned, one of them, being then in London, was not entitled to give it back to the London house, but should have sent it directly to the drawer.

(b) Per Lawrence, J., in *Darbishire v. Parker*, 1805, 6 East. 10, 11. Mr. Lyndes, B. 3, C. 6, Obs. 1, and Marius 97, had previously laid it down, that notice ought to be sent off by the first post. In *Carrick v. Harper*, 23 May 1790, Morr. 1614, it was laid down, probably on the authority of Marius, to be the rule in England, that notice should be given by the first post, though circumstances might justify a longer delay.

5. The rule which has been stated as to parties living in the same place, viz., that each party has a day for sending notice after he receives it, applies also where they live in different places (a). Prior indorsers.

6. Where a banker is employed to recover payment, an additional day is allowed for him, besides the parties to the bill or note, the employment of a banker being a recognised mode of recovering payment (b). 'In regard to notice, each branch of a bank is considered as a separate establishment (c).' Where bankers or agents employed.

7. If the day after that on which the party concerned gets notice falls on a Sunday, or any day when he is forbidden by his religion from attending to secular affairs, it has been held that he is not bound to send notice till the following day (d). By a statute Intervention of Sundays and holidays.

(a) *Bray v. Hadwen*, and *Williams v. Smith*, *antea*, 350, note (a), both imply this doctrine.

(b) In *Scott v. Lifford*, 1808, 9 East. 347 (so far overruling *Haynes v. Birks*, 1804, 3 B. and P. 599), where a bill had been deposited in the hands of bankers, they, as well as the other parties, were allowed a day after they had heard of the dishonour, to notify it to their constituents. Afterwards, in *Robson v. Bennett*, 1810, 2 Taunt. 388, it was recognised as allowable for a party receiving a check in payment of goods, to lodge it with his bankers to recover the amount, though the effect was to delay the negotiation of it, and consequently the notice of its dishonour to the defendants (the drawers), for one day longer than it would have been otherwise delayed. In *Langdale v. Trimmer*, 1812, 15 East. 291, where a day had been also lost in the negotiation of a bill, by the plaintiff giving it to his bankers to get payment, instead of presenting it himself, it was held by the Court of King's Bench (whose opinion was expressed by Lord Ellenborough), that the bankers were to be considered as distinct holders, not as identified with their customers, and that the plaintiffs were entitled to take a day after the bill was returned by the bankers, before giving

notice. In *Bray v. Hadwen*, *antea*, 350, note (a), where country bankers, with whom a bill had been lodged to get payment, though they got notice from London of its dishonour on 18th July, sent notice only by the post of the 19th, it was held by the Court of King's Bench, that each party, such bankers not excepted, was entitled to take a day for giving notice.

(c) *Clode v. Bayley*, 8 Nov. 1843, 12 L. J. (Ex.) 17.

(d) In *Haynes v. Birks*, 1804, 3 Bos. and Pull. 599, where the banker with whom a bill was lodged to recover payment did not hear of its dishonour till late on Saturday night, it was taken for granted that he was not bound to do anything in consequence till Monday. In *Hawkes v. Salter*, C. P. 1828, 4 Bingh. 715, it was held sufficient to have given notice by the Tuesday morning's post of the dishonour of a bill payable on Saturday, as the post went in the morning, seeing it was *contra bonos mores* to write on Sunday, and the holder was not bound to get up at an unseasonable hour on Monday morning to write in time for that post. The same doctrine was implied in *Bray v. Hadwen*, 1816, 5 M. and S. 68, and in *Wright v. Shawcross*, 2 B. and A. 501, note, where it was found that a party who

already referred to (a), 7 & 8 G. IV. c. 15, §§ 1-4, it is enacted, that, in the event of a bill or note falling due on a day before a public fast or thanksgiving, or the day before Christmas-day or Good Friday, notice of its dishonour shall be sufficient, if sent the day after these days, or, in the event of their falling on a Saturday, if sent on the Tuesday following. But this enactment is declared not to extend to Scotland.

(2.) *Time of day for notice.*

As to the time of day for giving notice, the same doctrine seems applicable which has been explained as to presentment (b), viz., that notice to a banker, or any person in business, will be valid only when given in the usual hours of business, but that to another person it may be given at any reasonable time of day or night, including the proper hours of rest.

6. *Place for giving Notice.*

Place for giving notice.

As to the place where notice of the dishonour of bills or notes should be given, or to which a letter of notice should be addressed, the same rules appear to be applicable as with regard to the place of presentment (c).

Due diligence must be used to discover the parties' residences.

It has been explained (d), that due diligence ought to be used to find out the drawee's residence, in order to present the bill; and the same diligence is necessary to find out the drawer or indorser's residence, in order to give him notice. 'It is always a question of circumstances in every case whether due diligence has been used (e) -

got a letter of notice on Sunday was not bound to open it till Monday, or to send notice to another party till Tuesday. In *Lindo v. Unsworth*, 1811, 2 Camp. 602, where the bankers with whom a bill was, had sent to notify its dishonour to the plaintiff on 8th October, but found his counting-house shut (he being a Jew, and the 8th being a great Jewish festival), so that he did not get notice till that day's post was gone, or give notice to the defendant till the post of the 9th, Lord Ellenborough held, that he was

excused by his religion from attending to secular business on the 8th, and was not therefore bound to give notice till the next day.

(a) *Antea*, p. 316. (b) *Antea*, p. 302.

(c) *Antea*, p. 281, etc.

(d) *Ibid.*

(e) *Bateman v. Joseph*, K. B. 1810, 12 East. 433. *Per curiam*: "Whether due notice has been given, is a question of law; but whether due diligence has been used to discover the place of residence of a person entitled to notice, is a question of fact."

As regards the drawer, it is in general sufficient to address the notice to him according to the place where the bill is dated, even though that address should be so vague as to be practically useless (*a*). As regards the indorsers, who do not usually write their addresses on the bill, greater precautions must be taken; and when they live in large towns, the holder must make inquiries to discover the particular streets in which they live, and their occupations (*b*). In regard to the extent to which these inquiries must be pushed, the decisions do not enable a precise rule to be laid down, but the holder will have only himself to blame if he neglect to use any obvious means of obtaining information.'

It has been considered (*c*) as sufficient diligence, to inquire at the last indorser, and the last but one, for the drawer's residence, in order to give notice to him, the day after the bill became due; and on the latter of these persons, who alone could give information, not being at home, to call back next morning, when information was got, and notice of dishonour immediately given. In the case of a promissory-note, it has been held sufficient to inquire at the maker's house for the payee's residence (*d*). But it has been considered not sufficient to inquire for an indorser's residence merely at the place where the bill was payable, without asking at any of the parties to the bill, or searching for persons of the same name in the Directory (*e*). If the drawer has left no notice at his last place of residence where he is to be found, and the holders of the bill have made inquiry after him at the person through whose request they advanced money on the bill, they will be excused for the delay of notification occasioned by their not finding him (*f*). In a case (*g*),

Examples of
sufficient or
insufficient
diligence.

(*a*) *Burmester v. Barron*, 22 Jan. 1852, 21 L. J. (Q. B.) 135. Here the notice was sent by post, addressed "London," where the bill was dated. It was held sufficient, though the drawer, who resided in Chelsea, and whose true address might have been learned from the acceptor, never got the letter. See also *Clarke v. Sharp*, 3 M. and W. 166.

(*b*) *Walter v. Haynes*, Ry. and M. 249. The address to the indorser in this case, which was simply "Mr Haynes, Bristol," was held insufficient.

(*c*) *Browning v. Kinnear*, 1819, Gow, 82, *per* Dallas, C. J., confirmed by the verdict of a jury.

(*d*) *Sturges v. Derrick*, 1810, Wightw. 76.

(*e*) *Beveridge v. Burgess*, 1812, 3 Camp. 262, *per* Lord Ellenborough.

(*f*) *Hodgson v. Bushby*, 18 July, 2 Dec. 1782, M. 1609, as reversed in the House of Lords, 2 Pat. Ap. 607.

(*g*) *Baldwin v. Richardson*, 1823, 1 B. and Cr. 245.

where a party, not knowing the address of the immediately preceding indorsers, wrote to inquire about it at his brother, who had taken the bill, and some delay occurred before he could get an answer, it was decided, that the indorsers were not thereby discharged, as all due diligence had been used, and as there had been no unnecessary delay in giving notice. A similar decision was given more recently (*a*), where the bill-holder asked for the residence of the defendant (an indorser), at a party (his brother-in-law), who had signed his name by his authority, but got no information, and afterwards not only notified the dishonour to him, but, 1st, directed his attorney to give due notice, in consequence of which a letter was sent to the defendant, addressed to the place where the bill was dated; and 2dly, having desired the attorney to use due diligence to find out his residence, the latter found it out on 16th October (more than two months after the bill became due), and, after consulting the plaintiff, notice was sent on 18th October. The Court of King's Bench, in this case, held, 1st, That notice to the defendant's brother-in-law (who had acted as his agent) was notice to him; 2dly, That due diligence had been used; 3dly, That the plaintiff's attorney was entitled to a day in order to consult the plaintiff, after getting information as to the defendant's residence, and that, therefore, the notice was in sufficient time on 18th October, as he was entitled, besides, to a day for giving notice, after he got the information on the 16th. A statement by an indorsee, in a letter, that he did not know the drawer's residence "till within these few days," has been held not to imply that he had learned it sooner than the day before (*b*).

If the drawer of a bill calls at the holder's counting-house before the term of payment, and says that it will not be paid, and that he has no fixed residence, but will call again and see whether it is paid, the holder will not be bound to seek after him, but he will be held to have taken the burden of inquiry on himself (*c*). The holder will not be excused, if a letter of notification has failed to reach the party in time, through a mistake in the address (*d*).

(*a*) *Firth v. Thrush*, K. B. 1828, 8 B. and Cr. 387.

(*b*) *Kirby v. England* (N. P.), 2 C. and P. 300.

(*c*) *Phipson v. Kneller*, 1815, 4

Camp. 285, 1 Stark. 116, per Lord Ellenborough.

(*d*) *Esdale v. Sowerby*, 11 East. 114, where the delay in giving notice arose from sending the bill, after it was dishonoured.

7. *By whom Notice is given.*

The chief purpose of notice is, that the party receiving it may secure his relief from the parties liable to him against the claim made upon him under the bill or note; and therefore such notice, if it does not state, must at least afford him reason to believe that a claim will be made against him. But his belief of this must depend much on the party from whom the notice proceeds. His mere knowledge that the bill or note has not been accepted or paid, affords no ground for such a belief; because it does not thence follow that the holder will resort to him for payment. Information, therefore, of non-acceptance or non-payment by a stranger, who has no concern with the bill or note, and does not act for any party to it (a), is not equivalent to notice, as it amounts to no more than the casual knowledge now mentioned (b). In one case, indeed, in Scotland (c), private knowledge seems to have been admitted at least as an element of notice. But, in that case (d), "there was that sort of intercourse among the parties, which left it to be inferred that the indorser was aware not merely of the dishonour, but of the holder looking to him for payment; particularly, there was a meeting of the parties, at which the acceptor made a partial payment." This last circumstance showed that the holder

Information
from stranger
is not suffi-
cient;

honoured, to a bank at Birmingham, instead of a bank at Liverpool. In the Scotch case of *Henderson v. Duthie*, 19 Jan. 1799, Morr. App. 9, it was held to be a good excuse for a party not notifying the dishonour of a bill, that he himself had not got notice in time from the bank for which he was agent, as the letter to him was miscarried. From the address being rather indefinite, the letter had been sent to another person of the same name; and it may therefore be doubted whether the bank should not have suffered for this consequence of neglect in the address. But there was no mistake in the address, it being correct so far as it went.

(a) But if a person is in possession of the bill, and really acts as agent for the

holder, he can give a valid notice, even though he does not set forth in it for whom he acts. *Woodthorpe v. Laws*, 24 Nov. 1836, 6 L. J. (Ex.) 69.

(b) In *Mackenzie v. Urquhart*, Feb. 1791, M. 1561, the Court held it "irrelevant to state that the drawer had heard of the dishonour of the bill by means of third parties, since he was to rely upon notification only from the porteur himself or his order." In the *Stirling Banking Company v. Duncan's Representatives*, 20 Feb. 1784, M. 1611, the Court expressed an opinion, that mere private knowledge of the dishonour of a bill was not equivalent to notice.

(c) *Irvine v. —*, 1791, M. 1617, Bell's Cases, 120.

(d) 1 Bell, 421, note 2.

was *in cursu* of enforcing payment from the acceptor; and, as the defender seems to have been a party to this payment, he must, from it, as from other circumstances, have been convinced, that he would be called on for payment, failing the acceptor. Supposing, therefore, that this case were a fit precedent, which has been doubted (a), it cannot impeach the rule, that information by a stranger, or, in other words, mere casual knowledge, is not equivalent to notice (b). But if the drawer or indorser gets information, whether from the holder or not, which certiorates him that the latter intends to claim recourse from him, the purpose of notice, viz., to enable him to take measures for his security, is answered.

but it is not essential that it should be received from holder.

The English courts seem to have at first too much narrowed the limits of notice. In one case (c), opinions are expressed, that notice ought to be given in all cases by the holder. But the only point as to notice then before the Court was, whether a request by the granter of a note to the defendant to take it up was equivalent to notice by the holder; and the Court may probably have been thus led to lay it down, that, *in that case*, notice could proceed only from the holder, without adverting to the other question of the validity of notice by an indorser. The case was decided on another ground. But the opinion now referred to was followed afterwards by an eminent authority (d), who, after citing the opinion of Mr

(a) *Vide* Mr Bell's remarks on it, in the passage cited, p. 355, note (d).

(b) *Vide* remarks on this subject in *Tindal v. Brown*, 1786, 1 T. R. 167. There are two cases illustrative of the same principle, *Nicholson v. Gouthit*, 1796, 2 H. Bl. 612, and *Whitefield v. Savage*, 1800, 2 Bos. and Pull. 277, in both of which recourse was denied for want of notice, although the party claiming it knew, before the term of payment, that the acceptor of the bill in the one case, and the granter of the note in the other, could not pay it, being insolvent. In *Stewart v. Kennett*, 2 Camp. 177, where a person who had been employed by the original parties to a bill to get it discounted notified its dishonour to the defendant, and told him where it was lying (he

having then no connection with any of the parties), Lord Ellenborough held, that this information could not be pleaded as notice by the holder, though it might if the witness had been his agent; and further laid down, that "notice must come from the person who can give the drawer or indorser his remedy on the bill, otherwise it is merely an historical fact."

(c) By the Court of King's Bench in *Tindal v. Brown*, 1786, 1 T. R. 167.

(d) *Per* Lord Chancellor Eldon, in *ex parte Barclay*, 7 Ves. 597. It is remarked in Selwyn's *Nisi Prius*, 333 note 25, that, when his Lordship pronounced this judgment, he was not aware of Lord Kenyon's opinion to the contrary in *Shaw v. Croft*, of which *post*, p. 358.

Justice Buller, as importing that effectual notice could only come from the holder, and stating that it had been frequently acted on since, decided on that ground, that notice by the indorser of a bill could not be available to the holder. But this doctrine seems not to be consistent with the principles which have been since established.

1st, It appears to be settled, that notice by an indorser to the drawer, or a prior indorser of a bill or note, will enure to the benefit of any intervening party (a). No intervening party can have a claim against the drawer or prior indorser, without paying to the party who gave notice; and by doing so, he acquires all his rights, and, among others, the benefit of the notice given by him. As it may not be certain, however, whether the holder has given notice to all the prior parties, it is prudent in any indorser from whom payment is demanded, to give notice, as soon as he gets it, to all the previous parties, in order to secure his recourse against them (b). For, if he has got notice, it will not afford him any defence, that the holder has not given notice to the previous parties, from whom he himself is entitled to claim recourse (c).

For notice by holder to drawer enures to intervening parties;

2dly, Although the holder of a bill or note should give notice only to his immediate indorser, he may avail himself of notice to any prior party, whether it proceeds from his indorser, or from some earlier indorser to whom the latter has given notice. This rule is conformable with the purpose of giving notice, as the party receiving it is put sufficiently on his guard, if it comes from any person who has a right to exact, and intends to exact payment, and that, whether payment is exacted by that party under his right of recourse, or by the holder. Accordingly, it has been decided in two cases (d), where actions were brought by the last indorsee against

and notice by intervening parties enures to holder.

(a) Chitty, 334. A party paying for the honour of an indorser, may also competently give notice. *Goodall v. Polhill*, 25 Jan. 1845, 14 L. J. (C. P.) 146.

(b) Chitty, 327.

(c) *Edwards v. Dick*, 1821, 4 B. and A. 212. In this case, the bill was accepted payable at a particular place; and, in an action against the drawer, he objected that non-payment had not been notified to the acceptor. Even

the latter would not have been entitled to urge such an objection, as an acceptor is not entitled to notice. But, at all events, the plea was held to be *jus tertii* to the drawer, because he had got notice.

(d) *Per* Lawrence, J., in *Jameson v. Swinton*, 1809, 2 Camp. 373; and *per* Lord Ellenborough, in *Wilson v. Swabey*, 1815, 1 Starkie, 34, part 2; *vide* also Chitty.

the drawer, that notice to a drawer or indorser by the plaintiff's indorser was available to the plaintiff, being held sufficient to "serve all the purposes for which notice is required," seeing the drawer or indorser was thus enabled "to take it up if he pleases, and he may immediately proceed against the acceptor or prior indorsers." In a later case (*a*), it was decided by the Court of King's Bench, on a review of all previous decisions, that the holder of a bill may avail himself of notice given by any person who is a party to it. The law may, therefore, be now considered as settled (*b*). 'But as a party who by the neglect of another has been discharged from the bill, or who by his own neglect has lost his right of recourse cannot give a notice which will benefit himself, neither can he give a notice which will enure to the benefit of others, because, in regard to the bill, he is in no better position than a stranger (*c*). It is not necessary that the party who gives notice should at the time be actually aware of the bill having been dishonoured for if the fact have been so, and the notice have been given after it, the requisites for valid notice are there, and the Court cannot enter into the state of mind of the giver (*d*).'

Notice given
by acceptor, or
the maker of a
note.

3dly, It has been much discussed, whether notice of dishonour by the acceptor of a bill, or granter of a note, preserves the holder's recourse against the party receiving notice. In an action (*e*) by the holder against the drawer, where it appeared that the acceptor had left a message at the drawer's house that the bill was dishonoured, this was accounted sufficient notice; it being held that "it made no difference who apprised the drawer, since the object of the notice was, that the drawer might have recourse to the acceptor."

(*a*) *Chapman v. Keane*, K. B. 1835, 3 Ad. and El. 193. In *Harrison v. Ruscoe*, 21 Feb. 1846, 15 L. J. (Ex.) 110, this case was strongly approved of, and (following it out) it was held, that a notice was good though the holder's attorney had erroneously represented himself as asking payment on behalf of a prior holder, it appearing that notice by that prior holder would have been good, and that the drawer had suffered nothing by the mistake.

(*b*) In *Lysaght v. Bryant*, 14 Jan. 1850, 19 L. J. (C. P.) 160, a bill was

indorsed to Lysaght and Smithett, who indorsed it to Lysaght's father (Lysaght junior retaining the bill as his father's agent); and on the bill being dishonoured, the firm sent notice. It was held that Lysaght senior was entitled to its benefit.

(*c*) *Per curiam*. In *Harrison v. Ruscoe*, supra, note (*a*); Story, § 304.

(*d*) *Jennings v. Roberts*, 25 Jan. 1855, 24 L. J. (Q. B.) 102.

(*e*) *Shaw v. Croft*, 1798, per Lord Kenyon, Chitty, 333, note 9.

Afterwards (a), in another action by the indorsees against the drawer, where it appeared, that after the bill had been presented and dishonoured, the acceptor wrote a letter to the drawer mentioning the dishonour, and stating that the bill was in the hands of the plaintiffs, this was held to be sufficient notice. 'These cases are explained by Mr Justice Bayley in his book on Bills (c. 7), on the supposition that the acceptor had special authority to give notice; and this explanation is now considered satisfactory—it being held as settled, that an indorser is not bound to regard a notice, unless it come from a party who would be entitled, on paying the bill, to demand reimbursement from him (b). In America it has been decided that notice by a drawee who refuses acceptance is bad (c).'

8. *To what parties to the Bill Notice must be given.*

Notice must be given to all parties from whom the holder intends to claim recourse (d). But it is not necessary to the acceptor of a bill, or maker of a note, because they are liable, at all events, as primary debtors, and, as they have no recourse against the other parties, cannot derive any benefit from notice (e). For example, it has been held (f), that the makers of a note payable at a particular banking-house, but of which payment was refused on the ground of "no effects," were not entitled to notice; and in another case, where the drawer and drawee of a bill were considered as identical, it was held to be a promissory-note, and the drawer's executors were subjected in payment, without notice of the dishonour to him (g). It

Notice not
requisite to
acceptor.

(a) *Rosher v. Kieran*, 1814, 4 Camp. 87, per Lord Ellenborough.

(b) See authorities cited in the preceding notes, and Story, § 304.

(c) *Stanton v. Blossom*, 12 Mass. 116, quoted, Chitty, p. 333.

(d) This point was fully discussed in Scotland, in *Elliot v. Bell*, 14 Feb. 1781, M. 1606, where it was decided, in conformity with a report from Sir Robert Herriés, an eminent merchant, that the holder of a promissory-note, who had given notice only to the last indorser, could not have recourse

against the prior indorsers, to whom no notice had been given. This decision, of course, did not touch the question as to the holder's title to avail himself of the notice given to such indorsers by other parties to the bill or note, which must be decided on the principles already explained.

(e) *Lyon v. Butter*, 7 Dec. 1841, 4 D. 178.

(f) *Pearse v. Pemberthy*, 1812, 3 Camp. 261, per Lord Ellenborough.

(g) *Roach v. Ostler*, 1 M. and Ryl. 120.

has been also repeatedly decided, that the acceptor of a bill payable at a certain place, for instance, at the house of his bankers, was not entitled to notice, because he was bound to see that payment was made there (a).

Notice to
indorser when
bankrupt,

In case of the bankruptcy of the drawer or of an indorser, and a sequestration or commission of bankruptcy against him, notice should be given to the bankrupt, or to the trustee vested with his estate for behoof of his creditors (b); at least, it will be no excuse for want of notice, that his estate is vested in assignees, provided his house is still open, whether in possession of a messenger or not (c), so that notice left there would reach his assignees. Whether the holder is bound, after a bankrupt's house is shut, to go in quest of assignees for the purpose of giving them notice, has not been determined (d). It has been found in England, that, even after commission of bankruptcy is issued, but before assignees are chosen, notice to the bankrupt is good; because, till the election of assignees, he still represents his estate (e). The same rule would probably be adopted in Scotland at any time after bankruptcy, but before the estate is vested in a factor or trustee for behoof of the creditors (f).

or to his
executor,
agent,

If the party be dead, notice ought to be given to his executor (g).

clerk,

In one case (h), it was held, that notice to a person's known agent was not in general sufficient, though it was doubted, but not decided, whether in that case the agent had not continued to represent his principal throughout the transaction. Notice to a clerk of the drawer and indorser, given at his place of business, will be as effectual as to himself; but not when it is given in a place not appropriated to the master's business (i). 'A verbal notice left with the

wife,

(a) In *Treacher v. Hinton*, 1821, 4 B. and A. 417, it was settled, after full consideration, by the whole Court of King's Bench, that the acceptor of a bill payable at a banker's was not, in any case, entitled to notice of non-payment, the banker being truly his agent; so that the banker's refusal to pay was a refusal by the acceptor, and it being besides the duty of the latter to ascertain that payment had been made.

(b) Chitty, 335; 1 Bell, 421.

(c) *Johnston ex parte*, 1 Mont. and Ayr. 622.

(d) *Rohde v. Proctor*, K. B. 1825, 4 B. and C. 517. In this case, the law was laid down, subject to the reservation stated in the text, by Mr J. Bayley, delivering the opinion of the Court of King's Bench.

(e) *Moline ex parte*, 19 Ves. 216.

(f) See *post*, Chapter IX., of Bills as affected by Bankruptcy and Insolvency.

(g) *Vide antea*, 285.

(h) *Crawford v. Maxwell*, 11 Nov. 1737, Elchies, No. 17, r. Bill.

(i) 1 Bell, 420.

if wife of a person who was not a merchant, and who was out when called for, has been held sufficient (a); and it has even been said that it would be sufficient in such a case to leave a verbal message with a servant (b).^{servant,}

Notice to one of several partners, or joint drawers or indorsers, is considered as notice to all (c); and, where one of them is likewise acceptor, his acceptance, implying knowledge of the bill, will stand as notice to all of them (d).^{or partners,}

If the party concerned has gone abroad, the rules as to notice appear to be the same which have been explained as to presentment (e).^{or to party abroad.}

It is now settled, both with regard to foreign and inland bills, as well as promissory-notes and bankers' checks, that it is not necessary to give notice to the drawer, in order to charge an indorser. Each indorser is considered, with reference to the holder, as a new drawer, who is, therefore, directly liable to him, whether the original drawer be chargeable or not (f).^{Notice to drawer not needed to sue indorser.}

The holder may select for recourse what parties he chooses, by
^{Holder may select among previous parties.}

(a) *Housego v. Cowne*, 15 Jan. 1837, 6 L. J. (Ex.) 110.

(b) Chitty, 336, on the authority of *Housego v. Cowne*, *supra*.

(c) This was held in *Porthouse v. Parker*, 1807, 1 Camp. 82, where a bill having been drawn by a person as agent of three parties, on one of these parties, and accepted by his authority, Lord Ellenborough held, that this acceptance was evidence of its being regularly drawn, and that, as it further proved that one of the parties knew of the bill, there was no need of notice, since the knowledge of one of these drawers was the knowledge of all. It of course follows, that express notice given to one of them would be held as notice given to all. In *Bignold v. Waterhouse*, 1 M. and S. 259, Lord Ellenborough lays it down as a general rule, "that, where several are concerned together in partnership, notice to one is equivalent to notice to all." *Vide* also 1 Bell, 420.

(d) *Vide Porthouse v. Parker*, note (c).

(e) *Antea*, 284.

(f) In an early case, *Pardo v. Fuller*, Comyns, 579, it was decided that the holder of a bill was bound, in an action against an indorser, to prove that he had given notice to the drawer. But the contrary doctrine, as stated in the text, was laid down in *Bromley v. Frazer*, 1 Str. 441, where the point was fully discussed with regard to foreign bills. The same rule was settled with regard to inland bills, and was likewise held applicable to promissory-notes, in *Heylin v. Adamson*, 1758, 2 Burr. 669. In *Rickford v. Ridge*, 1810, 2 Camp. 539, which was an action of recourse by the holder of a banker's check against the party from whom he got it, Lord Ellenborough laid it down, "That the holder of a check is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it."

giving notice to them alone. For instance, if he gives notice only to an intermediate indorser, all the parties subsequent to that indorser will be discharged. But if this indorser gives notice, in due time after receiving it, to one or more of the parties prior to him in the bill or note, his notice will not only preserve his own recourse, but will enure to the benefit of the holder, if he chooses to claim against these parties.

9. *Notice to persons not parties to the Bill.*

Notice to person delivering bill without indorsing.

When a person is not a party to a bill or note, though he has given it to the holder, he cannot insist on the same strictness of negotiation and notice as a drawer or indorser (*a*). No doubt, a person who has transferred, by mere delivery to a third party, certain notes payable to the bearer, without indorsing his name on them, is entitled to due notice of their non-payment, and is freed from all recourse on them by want of such notice (*b*). In the case now referred to, the defendant, from having been bearer of such notes, was in some sense a party to them. But, in a case (*c*) where a party took, in satisfaction of a bill due to him (though, as was held, not as a substitute for it), a bill drawn by a third party whose name was not on the first bill, and the last bill was dishonoured, but the dishonour not intimated to the drawer, it was held, that the creditor might recover on the first bill against the parties to it, to whom the negotiation of the other bill was *jus tertii*. On that principle, it was superfluous to give them notice of its dishonour. It has been also held (*d*), in an action for a debt against a party who had handed over a note to the plaintiff in payment of the debt, without indorsing it, that it was not necessary to prove presentment of the note to the maker. It cannot here be urged, as by direct parties to bills, that strict adherence to the rules of negotiation is necessary for their security and currency; nor is there the same objection, as in that case, against inquiring into the injury which may have been

(*a*) *Van Wart v. Woolley* (Q. B. 1825), 3 B. and C. 439.

(*b*) *Camidge v. Allenby*, 6 B. and Cr. 373; *Robson v. Oliver*, 28 May 1847, 16 L. J. (Q. B.) 437.

(*c*) *Bishop v. Rouse*, 1815, 3 M. and S. 362.

(*d*) *Goodman v. Coates*, 1 M. and Rob. 221.

suffered by failure in negotiation. 'The title to notice of dishonour depends on the nature and circumstances of each such case (a).'

Persons who are bound for payment of a bill or note by a separate letter of guarantee, do not seem entitled to the same strictness of negotiation as if they had been direct parties (b), though it is not easy to fix a certain rule as to the negotiation they may require. It may perhaps be held, that they are entitled to fair, though not rigid negotiation; for example, to get notice of dishonour, not so soon as is required in bills, but within such time as may enable them to protect themselves from loss. Thus (c), the holder of a bill, which was said to be included under a guarantee by the defendants, was cut off from recourse against them, as he had neither presented the bill nor notified its non-payment, either to the drawers or the guarantors (d), though the acceptors did not become bankrupt for a year, or the drawers for eight months afterwards; so that, but for his neglect, he might have secured payment, or the guarantors might have made good their relief. On the other hand (e), it was held to be no defence to a guarantor against payment of a bill drawn for a debt for which he had become bound on the acceptor's account, that it had not been presented at the term of payment, when such presentment would have done no good, as the acceptor had previously become bankrupt. Again (f), where the plaintiff had got from the defendant, but without his indorsation, a bill drawn by him upon and accepted by a debtor of his, and the bill was dishonoured on 4th February, but no notice given to the defendant,—it being proved, however, that between 4th and 11th February, at which last date the acceptor became bankrupt, he could not have paid the bill,—the defendant was held not to be discharged for want of notice, as he had not suffered loss. In another case (g), where the holder of a bill notified the acceptor's insolvency

Notice to
guarantors.

Law of Eng-
land.

(a) See *Turner v. Stones* (Q. B. 1843), 1 D. and L.; and *Lichfield Union v. Greene* (Ex. 1857), 1 H. and N. 844; both already referred to, *antea*, pp. 123, 124.

(b) *Phillips v. Astling*, 1809, 2 Taunt. 206.

(c) *Ibid.*

(d) The editor has substituted "guarantor" in place of "guarantee," as

being the more usual and correct designation of the person who grants the obligation.

(e) *Warrington v. Furber*, 1807, 8 East. 242 (*antea*, p. 305).

(f) *Swinyard v. Bowes*, 1816, 5 M. and S. 62.

(g) *Holbrow v. Wilkins*, 1822, 1 B. and Cr. 10. *Vide also*, as illustrating the same doctrine, the opinions ex-

to a guarantor before the bill became due, the latter was found entitled to object that there had been no regular presentment, and no notice of non-payment, as he could not have suffered any injury through the want of them.

‘The preceding cases establish that a guarantor is not entitled to insist on the same strictness of negotiation or notice as a party to the bill would be entitled to expect. Two subsequent cases have confirmed this principle, and have also established (what was in doubt when the former edition of this work was published) that the guarantor must aver and take the onus of proving that the want of negotiation or notice caused him actual loss before he can claim benefit from the plea. In the first of the cases alluded to, the Court of Common Pleas held that the guarantor of a bill must, in order to entitle himself to any benefit from non-presentment and want of notice of non-payment, show that he was thereby damaged, and set up this defence in his plea (a). In the second of the cases alluded to, the authority of the preceding case was followed by the Court of Exchequer, and a defence founded on want of presentment for payment held bad, in respect the guarantor did not aver that he had thereby suffered damage (b).’

Law of Scotland.

Such is the law, so far as it can be deduced from the English authorities, regarding guarantee as applicable to bills. What is the law of Scotland on the subject, it ‘was formerly’ difficult to say: ‘but there appears to be now little ground for supposing it to differ from that of England.’

Old cases.

In two early cases, one mentioned by Forbes, and the other shortly noticed by Lord Elchies (c), it is said to have been held that a person granting a letter of credit guaranteeing a bill was entitled to the same notice of its dishonour as an obligant on the bill. On the other hand, it has been repeatedly held, that when a person guaranteed a certain advance to be made to another party, the creditor might make good the guarantee against him on instructing the advance, without notifying it to him at the time of making it, or giving notice of the debtor’s failure to the creditor. This was expressed by the Court in the case of *Van Wart v. Woolley* (Q. B. 1825), 3 B. and Cr. 439. (b) *Walton v. Maskell* (Ex. 1845), 13 M. and W. 452. (c) *Alexander v. Wood*, 20 Nov. 1735, Elchies, No. 8; *Ewing v. Burnet* 7 Jan. 1681; Forbes, 10; M. 8219.

(a) *Hitchcock v. Humfrey* (C. P. 1843), 5 M. and Gr. 559.

pay, as of the dishonour of a bill. This was held as to a letter of credit for advances made by bills, though the letter did not specially refer to the mode of advance, where no notice was given except by raising the action, after the principal debtor had become bankrupt, and had absconded (*a*). In another case, where a letter of credit had been given for the purchases to be made by a certain individual within a limited time, the granter of the letter was made liable, without notification, although the principal debtor had in the meantime become bankrupt; the majority of the Court holding, without laying down a general rule, that, in this case, where the amount of furnishings was not great, and the period of the letter limited, no notice was necessary (*b*). In a case (*c*), where a person had granted a letter agreeing to guarantee such sums as another party might draw for, thus directly referring to bills, the Court sustained recourse against him on the letter, after the principal debtor's failure, though no notice had been given him, either of the advances on the bills, or the balance unpaid, which had been due for some time before. In a later case (*d*), where the defender had granted a letter of guarantee for a promissory-note, bearing that the note was to be renewed for four months longer, and had afterwards, in another letter, agreed to the renewal, and at the same time expressed his understanding that the money was to lie for a considerable time, he was held not to be released by the circumstance of no renewal having been taken, or notice given of the non-payment of the first note, and no diligence having been done on it for several months after it became due. But, in a case (*e*), where the defender had granted a letter of guarantee, which was held to apply to certain bills, the Court decided, though ultimately with hesitation, that the circumstance of the holder having failed to protest certain of these bills, when they became due, against the different parties to them, though all these parties had previously become bankrupt, and the

(*a*) *Mansfield v. Weir*, 9 June 1749, M. 8224.

(*b*) *Ewing v. Wright*, 2 June 1808, M. App. to Letter of Credit, 1.

(*c*) *Hamilton v. Carlisle and Dunlop*, 13 June 1766, M. 8227. *Vide* also *Stewart v. Frew*, 17 Feb. 1779, noticed *ibid*.

(*d*) *Todd v. Davidson*, 3 June 1828, 6 S. 904.

(*e*) *Alexander v. Scott*, 28 Nov. 1827, 6 S. 151. 'This case is very unsatisfactory as an authority. The grounds of the decision are not clearly stated; and if it decided what the rubric bears, it proceeded upon no authority, and has been followed by none.'

holder had ultimately drawn dividends from their different estates, cut off his claim of recourse against the guaranties. Whether there is any difference in such a case as to the guarantor's liability between want of protest and want of notice, when all the parties to the bills have previously become bankrupt, or whether the guaranties are entitled, in either case, to require strict negotiation, is a question which probably requires to be reconsidered.

Recent cases.

'In a recent case, what is the law of Scotland on this point was thus summed up by the Lord Justice-Clerk, with the concurrence of the other Judges of the Second Division: "I think it clear," his Lordship said, "that one who is not a party to a bill by his name being on the bill, but who merely guarantees payment of the bill when it falls due, is not entitled to notice of dishonour in the same way and on the same grounds as a drawer or indorser of the bill. And that is all the length I am inclined to go. I should be sorry to affirm the general proposition, that a party who guarantees payment of a bill is not entitled to some kind of notice. That is a question not in the law of bills, but in the law of cautionary obligations; and it depends on this, whether the creditor in the cautionary obligation has dealt fairly with the party who guaranteed the debt." This opinion seems to place the law on a satisfactory and intelligible footing. In deciding this case, it was assumed that the onus of showing loss from want of notice lay with the guarantor; for it was decided against him on the ground that he had neither averred nor proved that he had suffered anything by not receiving earlier notice than he did (a).

Notice to guarantors of acceptance.

'Cases in regard to the notice of non-acceptance, to which a party who guarantees the acceptance of a bill is entitled, are not numerous. The law, however, which regulates such cases, depends on the same principles as that regulating guaranties for payment. In a case (b), where the drawer of a bill had, on the acceptor's failure to retire it, promised by letter, notwithstanding an alteration

(a) *Brown v. Kirkland*, 23 Jan. 1861, 23 D. 363. For further information on the notice to which a party is entitled under the law of cautionary obligations, see *M'Taggart v. Watson*, 16 Apr. 1835, 1 Sh. and M'L. Ap. Ca. 591, and *Creighton v. Rankine*, 26

May 1840, 1 Robin. Ap. Ca. 99; and for further authority in support of the law stated in the text, see Story on Bills, § 372, and 1 Bell's Com. 377.

(b) *Smith v. Wright*, 26 Nov. 1829 8 S. 124.

on the bill, to retire it in fourteen days, and, within that time, sent a new draft on the same acceptor at ten days, which he desired the creditor to get accepted, and advise speedily, it was decided that the creditor, by neglecting to notify the non-acceptance and non-payment of this draft for two years, during which time the drawee had become insolvent, had forfeited all claim even on the first bill. In another case (*a*), a party guaranteeing the regular acceptance of bills by a separate letter, was found not released by their not being presented till the term of payment, when, in consequence of the drawer's intervening failure, acceptance was refused. It was held, that he could not insist on earlier presentment, unless it had been stipulated in his letter of guarantee.

If the indorser of a bill grants a separate bond to the holder, agreeing to pay him a certain sum *in case the bill is not paid within a specified time*, he cannot plead against payment of *the bond*, that the bill has not been duly presented for payment, or notice given him of its dishonour, because the bond is due on the sole condition of *non-payment* of the bill, without reference to its due negotiation (*b*). So, when all the parties to a bill are, besides, joint obligants to the holder in a bond of caution for payment of that and other bills, an indorser, though discharged as indorser by want of negotiation, will be liable under his bond of caution, unless he has suffered damage through want of negotiation (*c*). An obligant in such a bond of caution, whose name is not in the bill, is not entitled to plead the want of negotiation (*d*). The liability of such parties seems to depend on nearly the same principles as that of guarantees.

Notice to
guarantors
by bond of
guarantee.

10. *When Want of Notice excused.*

Neglect or delay to give notice may be excused by any cause not arising from the holder's fault, which has rendered notice impracticable; for instance, by the drawer or indorser, for whom notice was intended, absconding to avoid his creditors (*e*), or by the

When notice
impracticable.

(*a*) *National Bank v. Robertson*, 3 Feb. 1836, 14 S. 402.

(*b*) *Murray v. King*, 1821, 5 B. and Al. 165.

(*c*) *Jarron v. Smith*, 17 June 1803, M. App. 14, v. Bill.

(*d*) *Ibid.*

(*e*) In *Walwyn v. St Quintin*, 1797,

sudden illness or death of the holder or his agent, who was employed to give notice, or any other accident which prevents notice from being given (a). Such grounds of excuse would probably be sustained, even in favour of the holder of an inland bill or promissory-note, for failing to give notice in terms of the Act, within fourteen days after the date of the protest; for such an enactment must be understood to except those cases where accident has rendered the literal fulfilment of it impossible. But the holder will not be excused for delaying notice after the impediment to his doing so is removed. It has been held, that a party's detention from home by the dangerous illness of his wife is no excuse for not forwarding to a prior indorser notice of dishonour which reached his house by letter during his absence, as he was blameable for leaving a person who had no authority to open letters (b). The loss or destruction of a bill affords no excuse for delaying to give notice of non-payment (c).

When notice
dispensed
with.

The drawer of a bill will not be considered, in an action against him, as dispensing with notice of its dishonour, although, in the apprehension of dishonour, he has, before the term of payment, lodged money to meet it with two subsequent indorsers, on a receipt from them agreeing to repay him when they are exonerated from the bill, since they are held to be exonerated when he is discharged for want of notice (d). 'But a party may dispense with such notice, for example, by writing a doquet to that effect upon the bill (e); and he will be considered as dispensing with notice, if he tell the holder that the bill will not be paid (f); or request him to allow the acceptor some indulgence after maturity to pay the bill (g); or give the drawee orders not to pay it (h); or say to the holder

1 Bos. and Pull. 652, it was implied that this would have afforded a good excuse in law for want of notice, but the jury held that it was not consistent with the fact.

(a) Several cases of this kind are put in *Hilton v. Shepherd*, 1796, 6 East. 15, note.

(b) Per Lord Ellenborough in *Turner v. Leech*, 1821, 4 B. and Al. 451.

(c) *Thackray v. Blackett*, 1811, 3 Camp. 164, per Lord Ellenborough.

(d) *Clegg v. Cotton*, 1802, 3 Bos. and Pull. 239.

(e) *Muir v. Dickson*, 16 May 1860, 22 D. 1070.

(f) *Davidson v. Campbell's Creditors*, 25 Feb. 1791, H. 34; *Brett v. Leech*, 1811, 13 East. 214; *Burghe v. Leech* (Ex. 1839), 5 M. and W. 418.

(g) *Cairns' Trs. v. Brown*, 23 Jan. 1836, 14 S. 1000; *Campbell v. Patton*, 20 Dec. 1833, 12 S. 269.

(h) *Hill v. Heap*, 1823, 1 D. & R.

that he has no fixed residence, but will call and see if the bill has been paid (a); or shut up and leave his counting-house during business hours (b).'

When a person has drawn a bill without having effects in the drawee's hands down to the time of its presentment, or having any other claim for his acceptance, he is liable in general to recourse, whether dishonour be notified to him or not. This rule is subject only to one exception, to be afterwards noticed, where a person subscribes his name as drawer to an accommodation-bill for some of the other parties. The rule follows from the principle of notice, which is, that the drawer has reason to believe, unless told the contrary, that his draft will be honoured, and that therefore as the holder, by neglect of notice, leads him to suppose that this has been done, he must incur the risk of the bill. But that principle fails when the drawer has neither effects in the drawee's hands, nor any claim for acceptance, since in that case he must expect the dishonour of the bill from the first. It has been accordingly settled, both in Scotland and England, that he is not entitled to notice in such a case (c). He cannot even plead any other failure in negotiation; for instance, that the bill or note has not been protested (d). The circumstance of the drawer having no effects in the drawee's hands cannot excuse want of notice when pleaded by the indorser (e). It makes no difference that the drawer has been authorized to draw by a third party, his debtor, who is the drawee's creditor, but is not a party to the bill, since the holder's obligations cannot be affected by

When drawee has no effects.

(a) *Phipson v. Kneller*, 1815, 4 Camp. 285.

(b) *Allen v. Edmundson* (Ex. 1848), 2 Exch. 719, overruling *Crosse v. Smith*, 1813, 1 M. & S. 544, *antea*, 338, n. (e).

(c) *Littlejohn v. Allan*, 12 Dec. 1746, M. 1569; *Langley v. Hogg*, 17 June 1748, M. 1574; *M'Adam v. M'William*, 14 June 1787, M. 1613, 1 Bell's Com. 429, n. 5; *M'Alpin's Creditors v. Parsons*, 21 June 1792, M. 1617; *Hill v. Menzies*, 5 June 1805, M. App. v. Bill, 23.

In *Bickerdike v. Bolman*, 1786, 1 T. R. 405, the King's Bench held the drawer

not entitled to notice, seeing the drawee had no effects of the drawer in his hands from the date of the bill till it became due, but, on the contrary, was his creditor all the time. See also *Sharp v. Bailey* (K. B. 1829), 9 B. and Cr. 44; *Claridge v. Dalton* (1815), 4 M. and S. 226; and *Terry v. Parker* (K. B. 1837), 6 Ad. and El. 502, where the same rule was adopted.

(d) *M'Alpin's Creditors v. Parsons*, 21 Jan. 1792, M. 1617; *Legg v. Thorpe*, 1810, 12 East. 171.

(e) *Goodal v. Dolley*, 1787, 1 T. R. 712, and *Wilks v. Jacks*, Peake, 202.

private transactions with persons whose names are not on a bill (a).

When acceptor
has no effects.

But the drawee's acceptance of the bill creates a presumption of effects belonging to the drawer in his hands, which, even in England, must be redargued by other evidence (b), and which, in Scotland, can only be contradicted by the drawer's writ or oath (c). 'If, however, the holder has competently proved that the acceptor had no funds of the drawer, he sufficiently excuses want of notice without showing that the drawer suffered no loss therefrom (d).'

11. When Notice necessary though Drawee has no Effects.

When drawer
has good
grounds for
expecting
effects.

The drawer, however, will not be cut off from the privileges of negotiation, though the drawee has no effects of his, if he had good grounds for believing that he had or would have them before the term of payment. The decisions to this purpose are all English: but they proceed on a general principle of the law of bills, viz., that the drawer is entitled to presume, unless he gets notice, that the bill has been honoured; as he had reason to suppose that there were or would be funds in the drawee's hands which would oblige him to honour it. For instance, although there are no effects of the drawer in the drawee's hands at the time of drawing, yet, if he had reason to think that there would be effects before the term of payment, as, when he has consigned goods, not yet arrived, to the drawee, although the latter should reject the goods as of bad quality, and refuse acceptance on account of no effects, yet, if the drawer has no notice of the dishonour, he will be discharged (e). The

(a) In *Rogers v. Stephens*, 2 T. R. 713 (the case of a foreign bill), it was held to be a sufficient answer to the drawer's plea of want of notice, that he had no effects in the drawee's hands; and no regard was had to an offer which he made to prove that he had been authorized by a third party, his debtor, to draw on the drawee for a sum which the latter owed to this party, and that he had settled accounts with this debtor of his, believing, from the want of notice, that the bill had been honoured.

(b) *Tindal v. Brown*, 1786, 1 T. R.

167, as explained by Buller, J., in *Bickerdike v. Bolman*, 1786, 1 T. R. 405.

(c) Vide Mr Bell's remarks on Lord Braxfield's opinion in *McAdam v. Macwilliam*, i. 429, note 5. It was also recognised, when want of effects in the drawee's hands was pleaded, in answer to the objection of want of notice, in *Whyte v. Finlay*, 19 Jan. 1831, 9 S. D. B. 304.

(d) *Fitzgerald v. Williams*, 12 Nov. 1839, 9 L. J. (C. P.) 41; *Jamieson v. Jamieson*, 12 Feb. 1812, H. 60.

(e) So decided, first by Lord Ellen-

the same consequence follows, if he had a right to draw on the drawee under any fair mercantile agreement (a). But, where a person who had furnished goods to another on credit till the end of the year, drew a bill on him payable before that time, it was held that he could not be discharged by want of notice, as he had no reason to expect that the drawee, who as yet owed him nothing, would accept (b). It has been held in England, that title-deeds deposited in security for the amount of a bill were effects (c); and that bills accepted by the drawer for the drawee's accommodation were also effects, and authorized him to expect a similar acceptance in return (d).

It seems to be enough, in this class of cases, to give the drawer a claim for negotiation, if he has effects in the drawee's hands at any time from the date of drawing to the date of presentment.

When drawee has effects at any time before presentment;

borough, and afterwards by the whole Court of King's Bench, in *Rucker v. Hiller*, 1812, 16 East. 43, where, under the circumstances stated in the text, the holder was non-suited for want of notice to the drawer. A similar opinion, with regard to the effect of the drawer having consigned to the drawee goods not yet arrived, was expressed by Lord Ellenborough in *Legg v. Thorpe*, 1810, 12 East. 175, and by Eyre, C. J., in *Walwyn v. St Quintin*, note (c). In *Robins v. Gibson*, 1813, 3 Camp. 334, where the drawee proved that he had no funds of the drawer between the date of drawing and the term of payment, but stated that he had notice, before the bill was presented, that it was drawn on the credit of a cargo shipped by the drawer, which was in the hands of a broker for sale, and of which the proceeds were to be given him to answer the bill, it was held necessary, by Lord Ellenborough, to prove notice of the dishonour of the bill to the drawer. A similar decision was given in *Lafitte v. Slater* (C. P. 1830), 6 Bing. 621, where the drawer was held entitled to notice, the drawee, though he had no funds of the drawer, having accepted,

at the request of a third party, who was indebted to the drawer.

(a) This case is stated by Eyre, C. J., in *Walwyn v. St Quintin*, note (c).

(b) *Claridge v. Dalton*, 1815, 4 M. and S. 226. *Vide*, to the same purpose, *France v. Lucy*, 1 R. and M. 341.

(c) In *Walwyn v. St Quintin*, 1796, 1 Bos. and Pull. 652, where an indorser, for whose accommodation a bill was accepted, had deposited title-deeds with the acceptor as a security, Eyre, C. J., left it to the jury to say, whether there were effects in the drawee's hands, and they found that there were effects belonging to the indorser.

(d) *Per* Lord Chancellor Eldon in *ex parte Heath*, 2 Rose's B. C. 141, 2 Ves. and Beames, 240-2. The same doctrine has been since held at Nisi Prius, where the holder of a bill was found to have lost his claim against the drawer by failing to notify its dishonour, in respect the drawer had a right to draw on the drawee, from being liable on other bills accepted by him for the drawee's accommodation, and on which the latter had raised money; *Spooner v. Gardner*, 1 R. and M. 84.

If he has effects at the time of drawing, he has a right to expect that the bill will be honoured on that account, since it might be presented for acceptance immediately. He will therefore be entitled to notice and all other requisites of negotiation, though the effects should be withdrawn before presentment. For if the bill was presented immediately, his effects then in the drawee's hands would have ensured acceptance; and his right to notice, thus acquired by *bona fides* in drawing the bill, cannot be taken away by a future shifting of the balance between him and the drawee, as that would lead to endless investigations inconsistent with the nature of bills (a). Although there are no effects of the drawer in the drawee's hands either at the time of drawing, or at the date of presentment for acceptance, yet, if the bill has been accepted, and effects of the drawer come into the drawee's hands, before the term of payment, notice of non-payment must be given, because the drawer has effects in the drawee's hands (b).

even though
the effects are
insufficient.

When the bill is accepted, and effects are lodged with the acceptor before the term of payment, it is of no consequence though they should not be equal to the amount of the bill; because, "if there was an open account between the parties, and the acceptor were indebted in any sum to the drawer before the bills fell due, he had not necessarily ground for believing that his bills would be dishonoured (c). Even when two bills fall due at different dates, either of which exceeds the sum that the drawee ultimately owes the drawer before they respectively fell due, it has been held, that the drawer was not bound to suppose that either of them would be dishonoured; and therefore it was found, that neglect to notify the dishonour of them to the drawer discharged him from both (d). So, when the drawees have effects of the drawer in their hands at the time of presentment, although he owes them a much larger sum, and though they have, without his knowledge, appropriated

(a) So decided *per* Lord Ellenborough, delivering the opinion of the Court of King's Bench, in *Orr v. Magennis*, 1806, 7 East. 359.

(b) This was held by Lord Ellenborough, under the circumstances stated in the text, in *Hammond v. Dufresne*, 1811, 3 Camp. 145; and, though the case was afterwards

brought before the whole Court, his Lordship's direction on this point was not questioned.

(c) *Per* Lord Ellenborough, in *Thackray v. Blackett*, 1811, 3 Camp. 164; *Wilson v. Pollock*, 20 May 1830, 8 S. 782.

(d) *Ibid*.

these effects to pay it, he will still be entitled to notice; because, without it, he cannot know either of the appropriation, or that credit has been refused him on account of these effects (a). When there is a current account between the parties, the drawer seems, in all cases, entitled to due negotiation and notice, because he may otherwise believe that the bill has been honoured on the credit of the account (b); 'and he is entitled to this notice even though his account should actually be overdrawn at the time (c).' Some of these opinions were accompanied with strong doubts as to the decisions dispensing with notice and negotiation even when the drawer has no effects (d); but such opinions do not appear to be inconsistent with these decisions.

12. Notice in Accommodation-Bills and Notes.

The doctrine now explained, as to the drawer having generally no claim to notice or negotiation when he has not funds in the drawee's hands, applies, though under certain modifications, to accommodation-bills or notes, in which the parties, without any real transaction among them, subscribe bills or notes under the characters of drawers, acceptors, or indorsers, merely that they may be discounted, and the proceeds of the discount applied to the use of one of them, who is the party accommodated. In such transactions, when entered into for the *drawee's* behoof, the drawer, though he has not effects in the drawee's hands, at the date of the bill, is still entitled to notice. For it has been held (e), that in such bills the drawee admits by acceptance that he has got value from the drawer, if not at the date of the bill, at least in discounting it; and that, therefore, if the drawer pays, he has recourse against the drawee as proper debtor. But, to secure this recourse, it is neces-

Notice to
accommoda-
tion drawers.

(a) *Blackhan v. Doren*, 1810, 2 Camp. 503, per Lord Ellenborough.

(b) *Ibid.*

(c) *Bagnall v. Andrews* (C. P. 1830), 7 Bing. 217.

(d) In *Thackray v. Blackett*, 372, note (c), Lord Ellenborough says, "Judges of great authority have doubted of the propriety of the rule laid down in *Bickerdike v. Bolman* [369, (c)]; and I

certainly will not give it any extension." *Vide* also his Lordship's remarks on the same subject, in *Orr v. Magennis*, 1806, 7 East. 359, and in *Legge v. Thorpe*, 1810, 12 East. 171; and a Commentary by Parke, B., on the previous decisions, in *Carter v. Flower* (Ex. 1847), 16 M. and W. 743.

(e) *Antea*, p. 54, note (b), and cases therein cited.

sary, if the drawee fails to pay, that the drawer should be given timely notice of non-payment, as in any other bill, to enable him to take measures against the drawee (a). Accordingly (b), when a party had drawn a bill for the acceptor's accommodation, the Court, proceeding, not on the fact, which appeared on investigation, that, when the bill became due, the drawees had funds of the drawer in their hands, though not to its amount, but on general grounds applicable to all accommodation-bills, decided that the drawer was discharged by want of notice of non-payment. It was also held (c) that the drawer was entitled to notice from the payee, although the payee only, and not the drawer, had funds in the acceptor's hands. In that case, the drawer had signed for the accommodation of the acceptors, who, by their acceptance, admitted themselves to be proper debtors in the bill, and, consequently, he was a debtor, if he was obliged to pay through their default, and therefore he had right to negotiation and due notice, that he might secure his relief against them.

If the drawer of a bill subscribes it as drawer for the accommodation of another party, for instance of an indorser (knowing that the other parties also sign for his accommodation, and that he has no claim against them), he will still be entitled to notice and negotiation, that he may secure his recourse against the party whom he accommodates. In a case already cited (d), it was laid down that the holder of a bill cannot be relieved from the necessity of giving notice to the drawer, unless "by proving that the bill was for the accommodation of the drawer." The principle of this doctrine seems to be, that any party, whether drawer or indorser, is entitled, *ex facie* of the bill, to due negotiation and notice with a view to his recourse against prior parties; and that, though it should appear (which, in Scotland, it cannot do but by his writ or oath) that notwithstanding the form of the bill, none of the parties in it is liable

(a) *Brown v. Kerr*, 14 June 1809, H. 62.

(b) *Goldsmid v. M'Neill*, 26 May 1814, F. C.; 1 Bell's Com. 429, n. 6; H. 37. The same doctrine was also held, in an action by the holder against the drawer of a bill drawn for the drawee's accommodation, in

Hill v. Read, 1822, 1 D. and R. N. P. 26.

(c) *Scott v. Lifford*, 1808, 1 Camp. 246, per Lord Ellenborough, overruling on this point, *Walwyn v. Quintin*, 1797, 1 B. and P. 652.

(d) *Goldsmid v. M'Neill*, 26 May 1814, F. C.

to him but one, for whose accommodation he signed it, this evidence must be taken with the qualification annexed to it, so as to entitle him to negotiation and notice, with a view to his recourse against this party, as much as with a view to his recourse, in the ordinary case, against the prior parties on the bill. Accordingly, where a bill had been signed by a person as drawer, for the accommodation of a posterior indorser, it was decided that the holder's claim against the drawer was discharged by his not giving the drawer due notice of non-payment, though neither he nor this indorser had effects in the drawee's hands (*a*). One of the Judges (*b*) held that the defendant might have had recourse against the drawee, though he had no effects, as he had accepted, thereby rendering himself the principal debtor. But the decision proceeded on the ground that the drawer's claim of recourse against the indorser, for whose accommodation he subscribed, was precluded by want of notice. The authority of this case received full effect in a Scotch case, decided in the same way, under nearly similar circumstances (*c*).

The want of effects of the drawer in the drawee's hands will afford no excuse for neglecting notice or negotiation as to the indorser. He has, in any event, a claim of recourse against the drawer, or against the drawee, if he has accepted, though he has no effects; and, with a view to this claim, he is entitled to regular notice (*d*), and due negotiation. Accordingly, in an action by the holder against the indorser of a bill granted for the drawer's accommodation, it was found that the defendant was discharged by want of notice (*e*). In another case (*f*), where a bill drawn without value of the drawer in the drawee's hands had not been presented for acceptance till after the days of grace, when it was dishonoured,

Notice to
accommoda-
tion indorsers.

(*a*) *Cory v. Scott*, 1820, 3 B. and A. 619, confirmed by *Norton v. Pickering* (Q. B. 1828), 8 B. and Cr. 610.

(*b*) Abbot, C. J.

(*c*) *Henderson v. Ker*, 24 Nov. 1829, 8 S. 121. *Vide* Lord Medwyn's note in that case.

(*d*) This was held by Lord Kenyon in *Wilks v. Jacks*, 1793, Peake, 202, although it appeared that the drawer had no effects in the drawee's hands, it

being held that the indorser had no concern with the accounts between the drawer and acceptor. It was also held, under the like circumstances, in *Goodal v. Dolley*, 1 T. R. 712; *Malton v. Liddle*, 3 May 1859, 28 L. J. (C. P.) 257.

(*e*) *Orr v. Turnbull*, 1791, M. 1617; 19 June 1792, H. 37.

(*f*) *Hart v. Glassford*, 21 June 1755, M. 1580.

this want of negotiation was found to exclude recourse on it against an indorser. Some doubt has been thrown on this decision by the learned author (a), but it seems to follow from the principles already stated; for due presentment is as essential as due notice to enable the indorser to make good his recourse against the drawer or acceptor, since it is the immediate foundation of such recourse. A similar decision was given in favour of the indorser of a bill drawn without effects of the drawer in the drawee's hands, as the holder had neither duly protested the bill, nor given the indorser regular notice of its dishonour (b). The doctrine now stated seems applicable to every step of negotiation.

But farther, although an indorser should know that most of the parties to the bill have merely signed it, like himself, by way of accommodation, and should have no recourse against them, but only against a posterior indorser, for whose accommodation he has subscribed, he will, on the principles already explained, be entitled to negotiation and notice, that he may secure his recourse against this indorser. Thus, with reference to the case of an indorser where a party indorsed a bill which had been drawn without effects in the drawee's hands, for the accommodation of a subsequent indorser, it was decided, after full consideration, that the holder, by neglecting to give notice to the first indorser, had discharged him, as he was thus prevented from following out his recourse against the other indorser (c). In another case (d), where a person who was lately insolvent had, to raise money, granted a promissory-note payable on demand to the defendant, who indorsed it to give it credit, that it might be deposited with the plaintiff's bankers, and they, in consequence, made advances on it at first, and renewed them at the end of six months without the defendant's knowledge; the plaintiffs having failed to give the defendant notice of its non-payment, were found to have thereby discharged him. In another case (e), where a party had indorsed, for the granter's accommodation, a promissory-

(a) 1 Bell, 429, note 4.

(b) *Finlayson v. Ewen*, 2 Feb. 1773, M. 1597.

(c) *Brown v. Maffey*, 1812, 15 East. 216. So decided, in that case, first by Lord Ellenborough, and afterwards by the whole Court of King's Bench, over-

ruling *De Beritt v. Atkinson*, 1794, 1 H. Bl. 336; see also *Sands v. Clark* (C. P. 1850), 8 Com. B. Rep. 751.

(d) *Smith v. Beckett*, 1810, 13 East. 187.

(e) *Nicholson v. Gouthit*, 1796, 1 H. Bl. 509.

note, payable to himself, being thus in the same situation as if he had drawn and indorsed a bill payable to himself for the acceptor's accommodation, the indorser was held to be discharged for want of due presentment and notice, though he knew of the granter's bankruptcy when he interposed his guarantee for him. It has been also decided, that a person who indorsed *bona fide*, at the request and for the accommodation of another, a bill drawn and accepted payable to him, but in which both the drawer's and acceptor's names were fictitious, was discharged for want of notice, seeing he required notice to make good his recourse against the party whom he had accommodated (a).

'An accommodation acceptor is not entitled to notice of the bill not having been taken up by the party for whose accommodation he accepted. This was held in a case where there were two acceptors, one of whom was principal and the other cautioner; and the case was a strong one for applying the rule, because, as the bill was issued blank, the cautioner had not the means of knowing when it was presented to the principal, and, though the relationship of principal and cautioner did not appear *ex facie* of the bill, the holder was well aware of it (b).'

Notice to accommodation acceptors.

13. Waiver of Notice or Negotiation.

Notice or negotiation may be waived. The objection of want of notice is personal to the party entitled to require it. Its purpose is, that it may secure his indemnity; and though it has been deemed expedient to presume, without allowing evidence to the contrary, that this object has been frustrated wherever notice is neglected, the presumption will be obviated if the party interested renounces it. His waiver of notice affords the best evidence that, as to him, it was not required. Waiver is not, therefore, the revival of the claim of recourse against him, but a declaration that there was no ground for the only plea on which it could be discharged. Hence, if all the parties have got notice but the last indorser, who waives his right to notice and pays the bill or note, the prior parties cannot object to his recourse on them, that it is extinguished. For

General principles.

(a) *Leach v. Hewitt*, 1813, 4 Taunt. 731. (b) *Lyon v. Butter*, 7 Dec. 1841, 4 D. 178.

he has merely an objection which was personal to himself, and is *jus tertii* to them. If they have got notice, they could not resist a claim by the holder of the bill or note, and, as the last indorser, by waiving notice and negotiation, stands between the holder and them, by making payment in their place, they cannot refuse to relieve him. But his recourse against them subsists only if they have got notice or waived it; since the want of it, if it is not dispensed with, will discharge them from all claims on the bill or note, whether by the holder or any other party. On the other hand, as presentment, protest, and other steps of negotiation, must, from their nature, either subsist absolutely as to all the parties, or have been altogether neglected, any party may probably dispense with them, as he does with the want of notice; but all claim against the other parties, whether by him or by the holder, will be extinguished, unless they likewise have dispensed with them.

When negotia-
tion held to be
waived.

English cases.

On the principles now explained, any party, so far as he is concerned, may dispense with notice or any other requisite of negotiation. It has been held, that this may be done by making a partial payment (a); or by a promise to pay, made after the failure in negotiation has occurred (b), and either before or

(a) In *Vaughan v. Fuller*, 1745, 2 Str. 1246, which was an action by the indorsee against the indorser of a note, it was held by Lee, C. J., that a partial payment by the defendant was sufficient "to dispense with the proof of a demand on the maker of the note." In *Horford v. Wilson*, 1807, 1 Taunt. 12, which was an action by the indorsee of a bill against the drawer and indorser, an admission by the defendant's attorney that the defendant had made a partial payment, was held sufficient by the Court of Common Pleas to exclude an objection that there had not been sufficient proof of notice.

(b) This was held by Raymond, C. J., in *Haddock v. Bury*, 1730, mentioned in a note to 7 East. 236, with regard to the effect of a subsequent promise by an indorser in obviating the objection that a demand had not been made in sufficient time upon the

drawer. The objection seems to have proceeded on the doctrine, now exploded, that a demand must be made on the drawer, in order to charge the indorser. But the rule as to the effect of a promise in obviating objection, is notwithstanding correct. A similar decision was given, in *Walker v. Morris*, 1756, 1 Esp. R. 588, as to the effect of a subsequent promise to pay in obviating the objection of want of notice. The same doctrine was held by Lord Kenyon in *Wilkens v. Jacks*, 1793, Peake, 204, in answer to an objection of want of notice; Lord Ellenborough, in answer to a similar objection, and also to the want of a protest, in *Gibbon v. Coggan*, Camp. 188; by the Court of King's Bench in *Lundie v. Robertson*, 1808, 7 East. 231, as to the effect of such promise in superseding the necessity of proof of notice or presentment:

after (a) action is raised ; or a promise by implication, as to "see the bill paid" (b) ; or by an acknowledgment that it must be paid (c) ; or even by a promise of the indorser, made in answer to a letter demanding payment, that when he comes to town he will set the matter right (d) ; or by a promise to pay part, which will imply a waiver only as to that part (e) ; or by an engagement to pay a composition on the whole, which will be a waiver as to the whole (f). 'It is almost needless to multiply examples of such cases, for any distinct subsequent admission of liability is sufficient to infer waiver (g). Where a party says expressly that he will not avail himself of the notice of dishonour (h), or that he will call immediately with the money (i), there can be no doubt. It seems, however, that the English Courts are much disposed to discourage the technical objection of want of notice, and to hold it as waived on somewhat slight grounds. In one case, mere silence, consisting in the neglect to defend an action, was held a waiver (k) ; and in another an admission of liability not

Bayley, J., with reference to the objection of non-presentment, in *Taylor v. Jones*, 2 Camp. 105; by Lord Ellenborough, with reference to the objection of want of notice, in *Wood v. Brown*, 1 Stark. 217; and with reference to the want of proof of presentment, in *Hodge v. Fillis*, 1813, 3 Camp. 463.

(a) *Hopley v. Dufresne*, 1812, 15 East. 275.

(b) *Hopes v. Alder*, 1799, 6 East. 16. The objection which this promise was held to obviate was founded on the want of notice.

(c) *Rogers v. Stephens*, 1788, 2 T. R. 713, which was also the case of an objection founded on want of notice.

(d) So decided at Guildhall, with reference to an objection of want of notice, in *Anson v. Bailey*, stated in Buller's Nisi Prius, 276.

(e) *Fletcher v. Frogget*, 2 C. and P. 569; *infra*, p. 380, note (c).

(f) *Margetson v. Aitken*, 3 C. and P. 338.

(g) *Woods v. Dean*, 6 Nov. 1862, 32 L. J. (Q. B.) 1. In this case, the indorser, being threatened with legal

proceedings, promised to pay if he got time. In *Cordery v. Colville*, 18 April 1863, 32 L. J. (C. P.) 210, the promise was made two months after the dishonour.

(h) *Brownell v. Bonney*, 12 Jan. 1841, 10 L. J. (Q. B.) 71. Here the drawer said, on being applied to, that "he had no other intention than to pay the bill, and should not avail himself of the informality of the notice of dishonour."

(i) *Mills v. Gibson*, 2 June 1847, 16 L. J. (C. P.) 249. The bill became due on the 13th. On the 30th, the drawer wrote to the holder, "You know I meant to call on you immediately after the 24th with the money. The acceptor is an old and intimate friend of mine."

(k) *Rabey v. Gilbert*, 30 June 1861, 30 L. J. (Ex.) 170. The drawer sued two indorsers, who allowed decree by default. The subsequent indorser of the two, on paying, sued the prior for relief, and it was held that the defendant was barred from pleading want of notice.

made to the holder or his agent, but to a mutual friend who had no concern with the bill, was held sufficient (a). A conditional promise may be taken advantage of as inferring waiver without proving the purification of the condition (b); but when payment is being enforced, the indorser will be entitled to the benefit of any qualification he may have made (c). As the total want of notice may be cured by waiver, it is still more plain that a mere defect in the notice may be obviated by an admission of liability (d).'

Scotch cases.

In Scotland, a letter from the drawer of a bill to the holder, regretting that it was so long overdue, has been held to exclude the averment of want of notice (e). But it has been held, that the indorsers of a bill had not waived the necessity of notice, merely because, on receiving a letter from the holders, long after the due time for notice, asking payment, they sent no answer, but wrote to the drawee desiring him to make payment (f). In another case (g), a bill of suspension was passed to try a question of waiver, founded on two letters from the drawer and indorser, one promising payment by the acceptor, and another requiring him to make payment. It has been decided (h), that waiver of notice by an indorser was to be inferred from his including the bill in a trust-disposition for behoof of his creditors, executed after it became due, though the deed contained a clause reserving all objections to the claims, and stated that they were enumerated merely as made by the creditors themselves. This decision, however, seems doubtful; since the reservation, though said to have been merely one of style in all such deeds, must have been meant to reserve every objection (i). Notice has

(a) *Norris v. Salamonson*, 24 Jan. 1837, 6 L. J. (C. P.) 100. A mutual friend of the holder and indorsee met the latter in a theatre, and asked him if he knew of the dishonour, and received the answer "that he did, and had got a very civil letter on the subject, and that he would attend to it."

(b) *Campbell v. Webster*, 7 June 1845, 15 L. J. (C. P.) 4.

(c) *Fletcher v. Frogatt* (N. P.), 2 C. and P. 569. The bill was for L.200. On being applied to, the indorser said he did not mean to insist on the want of notice, but he was only due L.70.

The jury, under Abbott's direction, returned a verdict for that sum.

also Chitty, p. 311; and Story, § 20.

(d) *Houlditch v. Cauty*, 30 April 1838, 7 L. J. (C. P.) 217.

(e) *Mills v. Hamilton*, 1 Dec. 1830, 9 S. 111.

(f) *Murray v. Morrison*, 2 July 1824, 3 S. 202.

(g) *Allan v. M'Donald*, 18 Dec. 1827, 6 S. 260.

(h) *Coulter v. Martin*, 21 June 1771, M. 1601.

(i) Vide Mr Bell's note of this case, i. 421, note 6.

been held to be waived, by a party writing, asking indulgence, and promising payment, in answer to a letter which demanded payment, several months after the bill had been dishonoured (a). 'It was also held to be waived, where a party, on being informed of the amount of the debt, stated no objection to the want of notice of dishonour, but proposed taking a certain course towards payment (b).'

When negotiation not held to be waived.

It has been held in England (c), that an offer by a party, in the way of compromise, to give his bill for the debt, does not exclude want of notice if the compromise is refused. A similar decision has been given as to the effect of an offer to pay by instalments, when refused (d). A conditional promise by a foreigner, who says that he is ignorant of our law, but that he will pay if he is legally bound, has been found not to supply the want of notice, because, when it is not wanting, he is not legally bound (e). It has been held (f), that an offer made for the indorser to pay L.30 on account of the bill, with costs, and secure the residue by a warrant of attorney, does not dispense with notice, being a mere offer made on condition of getting time. The contrary was decided soon afterwards (g), regarding an offer to pay a composition of 10s. per pound, which was held to be a waiver of notice, as it had been in another case, regarding an offer to pay all the drawer's debts, which was rejected (h). But this decision appears to be very doubtful (i).

A promise of payment, or a partial payment, will not be effectual, if the party making it is proved not to have known, at the time of the failure in negotiation (k), or if payment was made, in conse-

Promise made in ignorance of facts.

(a) *Turnbull v. Hill*, 16 Feb. 1831, 9 S. 456.

(b) *Walt v. Fullerton*, 19 Jan. 1816, H. 74.

(c) *Per Lord Ellenborough*, in *Cuming v. French*, 1809, 2 Camp. 107, note.

(d) So decided in *Goodal v. Dolley*, 1787, 1 T. R. 712, by the Court of King's Bench, who held, that when such an offer was rejected, matters came back into the same situation in which they were before.

(e) *Per Lord Kenyon*, in *Dennis v. Morrice*, 1800, 3 Esp. 158.

(f) *Per Denman, C. J.*, in *Standage v. Creighton*, 5 C. and Pay. 406.

(g) *Per Park, J.*, in *Dixon v. Elliot*, 5 C. and Pay. 437.

(h) *Margetson v. Aitken* (N. P.), 3 C. and P. 338.

(i) *Vide Cuming v. French*, *antea*, note (c). Story, § 320, note, says *Margetson v. Aitken* is very questionable as an authority, as the composition was not accepted.

(k) In *Goodal v. Dolley*, 1767, 1 T. R. 712, it was held *inter alia* by the Court of King's Bench, that a promise to pay could not bind the defendant, when made in ignorance of the want of notice. The same doctrine was held in *Blissard v. Hirst*, 1770, 5 Burr. 2670, where the defendant had made a

quence of the acceptor's embarrassed circumstances, not to the holder, but to the last indorser, before the bill became due, and therefore, on the assumption that due notice would be given. It has been even held, that a payment made under protest, in ignorance of want of negotiation, may be recovered back, when the person making it did not know of the failure in negotiation, and the other party improperly concealed it from him (b). A person, however, paying a bill or note from ignorance of the want of negotiation for instance, of notice, will not have a claim of reimbursement against other parties, prior to him on the bill or note, who have received notice, as they are thereby discharged, but his only claim will be against the party who has improperly taken payment from him (c).

Promise under
misapprehen-
sion of law.

But a party cannot get quit of the effect of a partial payment or promise of payment, by pleading, that he did not know the legal effect (d). Thus (e), where the drawer of a bill, after being aware that the holder had given time to the acceptor, said, "I know I am liable, and if Jones" (the acceptor) "does not pay, I will," it was held to be no answer to this promise that it was made

promise of payment, while he was not aware that the plaintiff had not given notice of the non-acceptance of the bill (though it had been separately presented for acceptance), till after payment likewise had been refused.

(a) *Picken v. Graham*, 3 Tyrwh. 923.

(b) So held in *Chatfield v. Paxton*, 1797, 2 East. 471, note. The case is a circumstantial one, from which it is not easy to deduce any general principle. The plaintiffs, the drawers of a bill, the holders of which had been guilty of laches, by giving indulgence to the acceptor, having got some notice of this laches, but not having, as the majority of the Court held, a sufficient knowledge of it, accepted another bill for the amount of the first bill, and afterwards paid it, but under protest that they should be afterwards entitled, if the holders had been guilty of laches, to recover back the money. They ac-

cordingly brought an action for the purpose, and had a verdict, which was affirmed by the whole Court; it being held, as already mentioned, that they had no proper knowledge of the defendant's laches at the time of making the payment, and that the defendants had improperly concealed it from them.

(c) In *Roscoe v. Hardy*, 1810, 12 East. 434, the posterior indorser of a bill who had paid it in his own wrong, seeing that he, as well as all the prior indorsers, had been discharged for want of notice, was found, though he had taken a re-indorsation, to have a claim of recourse against a prior indorser. The same doctrine was held with reference to a claim of recourse by a posterior indorser who had paid against a prior indorser, in *Turner v. Leach*, 1821, 4 B. and A. 451.

(d) *Antea*, p. 272.

(e) *Stevens v. Lynch*, 1810, 12 East. 38.

ignorance of the law. Again, in the case of a foreign bill (a), where the declaration alleged that the bill had been regularly presented and protested, this was held, in an action against the drawer, to be proved by his saying that it was all regular, and that he wished to make an arrangement for payment of it. In another case (b), the indorser of a note having said, on being arrested for it, that it was true his name was on it, but he had security, though he wished time to pay it, it was held that such a promise, made in ignorance of his rights, could not excuse the want of notice. But this decision seems contrary to the principles established by more recent cases, and appears to have been influenced in part by the situation in which the promise was made.

It has been explained, that a promise to pay, or partial payment made after the neglect of negotiation has occurred, is not the revival of a claim discharged by the holder's laches, but rather the abandonment of an objection which would have discharged it. The English Courts have proceeded on similar grounds, holding that a promise affords presumptive evidence against the person making it, that negotiation has been duly followed out, so as to render evidence of it unnecessary, and exclude him even from proving want of negotiation (c). If he knew of the want of negotiation when he

Effect of
waiver.

(a) *Greenway v. Hindley*, 4 Camp. 12; vide also *Gibbon v. Coggan*, 2 Camp. 188.

(b) *Rouse v. Redwood*, 1794, 1 Esp. 155, per Lord Kenyon.

(c) So held by the Court of King's Bench, in *Lundie v. Robertson*, 1806, 7 East. 231, and by Bayley, J., in *Taylor v. Jones*, 2 Camp. 105.

In the former of these cases, there having been no notice, and no evidence of presentment, but the defendant (an indorser) having first positively promised to pay, and afterwards, on the holder calling again at his desire with a note of the expenses, having said that he had got no notice, but that he would pay the bill; the Court of King's Bench, whose judgment was delivered by Lord Ellenborough, decided, that there was no occasion for proving either present-

ment or notice. His Lordship said, that there was a presumption of due presentment and notice from the first promise, which was absolute, and that, though the defendant stated in the second conversation, that he had not got notice, yet his waiver of notice, which he made in the same breath, excluded the objection,—in short, that the matter was brought back to the first promise, which implied an admission that everything had been rightly done, and that there was no objection to pay the bill. This opinion seems to imply, that either the first or the second promise would have been sufficient.

In the latter case, Bayley, J., held, that when a party to a bill or note, knowing it to be due, and that he was entitled to notice and all other steps of negotiation, promises to pay it, "this

made the promise, it will exclude him from objecting afterward ~~s~~, as it implies an admission, which he cannot retract, that there ~~is~~ no subsisting objection to payment of the bill (a). Farther, though it should not be proved, it will be presumed, that he knew of the failure (b); and, where no direct failure in negotiation is established, the promise will relieve the holder from proving, as he is otherwise bound to do, that there has been due negotiation (c).

When a party waives negotiation by a promise of payment, this promise is effectual, not only to the party to whom it was made ~~but~~ to any third party who comes in his right to the bill (d); for, ~~who~~ ever may acquire it, such a promise precludes the party making it from objecting to his liability.

14. Indorsers' Liability after due Negotiation.

After due negotiation, the indorsers must pay immediately.

If the drawer or indorsers receive due notice of dishonour, and all the other requisites of negotiation are observed, they are liable in immediate recourse on failure of the acceptor or granter; but not till a demand is made on them, since it is only then that they can be aware of it. In this respect they differ from the acceptor or granter, who, as already shown (e), is liable, at least to the original payee, without a formal demand, since it is his duty to find out the payee and make payment. The drawer or indorsers are bound to pay *immediately* when the demand is made on them. It has been laid down, indeed (f), that they must be allowed a reason-

is presumptive evidence of the presentment and notice, and he is bound by the promise so made." Similar doctrine was laid down in *Ganson v. Metz*, 1823, 1 B. and Cr. 193, where the drawer of a bill was found to be excluded from pleading want of notice against the holder, by having made an arrangement for paying the bill to the holder's immediate indorser; thus admitting, as was held, that he still owed it, and thereby acknowledging that he had received due notice.

(a) *Vide* Lord Ellenborough's judgment in the preceding case of *Lundie v. Robertson*, 383, note (c), as to the

defendant's promise, when he knew of the want of notice.

(b) *Vide* *Hopley v. Dufresne*, 1312, 15 East. 275, and *Turnbull v. Hill*, 381, note (a).

(c) *Vide* opinions expressed in the cases cited 383, note (c).

(d) *Potter v. Kaycorth*, 1811, 13 East. 417. The doctrine in the text was established in this case by a verdict given under Lord Ellenborough's direction, and confirmed afterward by the judgment of the whole Court.

(e) *Antea*, p. 359.

(f) Chitty, 8th edition, p. 371. the last (10th) edition of Chitty,

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able time after the demand, to make payment; and a case is cited (a), where the drawer of a bill, who tendered payment of its amount, but not of interest, the *day after* a demand, and before a writ was issued (the offer, however, being refused, as he would not pay also the expense of a writ, which had been issued the same day), was absolved from an action in respect of his offer. The only additional sum which he was bound to have offered in this case was the interest, which, as remarked (b), would have been under three farthings; and this circumstance probably influenced both the Jury and the Court of Common Pleas, who afterwards affirmed their verdict, in dismissing so frivolous an action. But the legal grounds of the decision have been justly questioned by an eminent author (c), as the drawer had committed a breach of contract, though slight, in not paying immediately on demand, and was therefore liable for the damages, however trifling, which had been incurred. It was correctly observed (d), in delivering the judgment, that he could not know who was the holder till he was informed; but he ought to have paid whenever he got information. It has been held since (e), that an indorser is liable to an action for payment, immediately on the dishonour being notified to him.

SECTION V.

EFFECT OF NOVATION, RELEASE, OR INDULGENCE BY THE HOLDER OF A BILL OR NOTE TO ANY OBLIGANT ON HIS CLAIM AGAINST THE OTHER OBLIGANTS.

If the holder of a bill or note observes all the requisites of negotiation, his recourse against the several obligants will remain, though he should not take active measures to recover payment from

rule is stated, as in the text, that the drawer and indorsers must pay immediately, on the authority of *Siggers v. Lewis* (C. P. 1834), 1 C. M. and R. 370, quoted *infra*.

(a) *Walker v. Barnes*, 1813, 5

Taunt. 240. See also *Soward v. Palmer*, 1818, 8 Taunt. 277.

(b) *Bayley*, 350.

(c) *Bayley*, 350, and in note 38 to the same page.

(d) *Per* Sir J. Mansfield, C. J.

(e) *Siggers v. Lewis*, p. 384, note (f).

the acceptor or granter, this being left to his discretion. Nor have subsequent parties right to complain; because, when the dishonour of the bill or note is notified to them, they become entitled to secure their own relief by paying it, and then suing any of the other parties (a). It has been farther shown (b), that the holder may take a partial payment from the acceptor or any other party, without thereby discharging the remaining parties. He may likewise, without such a risk, take additional security, for instance an infestment of annualrent, or disposition in security (c) from any other parties, if he does nothing to restrict or discharge, wholly or in part, his claim against the party giving the security. But, if he does this without the assent of those subsequent to that party, and who have therefore a claim against him, his claim against them will be renounced.

1. *Novation or Release.*

Express discharge of prior obligant.

The simplest case of this kind is where he expressly discharges the acceptor or granter. It has been held, that, by such a discharge, the debtor is released, not merely from the direct claim by the holder, but from any claim of relief by other parties in the holder's right or otherwise, after paying him; for it would be no discharge, if the debtor were to be free, only as to the holder, and yet were bound to the full amount, when the bill or note was claimed, by any other party who had paid it to the holder (d). Such a dis-

(a) The substance of this doctrine is laid down by Eyre, C. J., in *Walwyn v. St Quintin*, 1797, 1 Bos. and Pull. 652.

(b) *Antea*, p. 262.

(c) In *Nicholson v. Morrison*, 7 Feb. 1711, M. 1552, although the Court adopted principles as to notification of the dishonour of an inland bill different from those which are now established, yet, with reference to another part of the case, they justly held that the mere circumstance of the holder taking an infestment of annualrent from the acceptors, such infestment not being considered as taken in *solutum*, did not discharge the drawer.

In *Allan v. Laidlaw*, 3 Dec. 1824, 3 S. 356, it was held to be no objection to the holder's claim against the drawer and indorser of a bill, that he had taken an heritable bond and disposition from the acceptor, partly as a security for the sum contained in the bill.

(d) This doctrine is laid down with regard to the effect of giving time to the proper debtor (and the same rule holds as to the effect of discharging him), with reference to the subsequent parties, by Bayley, J., in *Claridge v. Dalton*, 1815, 4 M. and S. 232. The same doctrine is admirably explained by Pothier, Nos. 175-82.

Discharge, therefore, by the holder to the acceptor, or any other parties, has been held to release the parties subsequent to the party discharged, because it cuts off their relief (a); and therefore the holder, by granting it, is presumed to have taken the whole debt on himself. In this view, it is not competent to inquire whether the subsequent parties would have reaped benefit from the claim thus cut off, as the holder has taken the claim on himself, without inquiring into this matter.

'The discharge, even on part payment, of one of several joint acceptors or makers (who is not bankrupt) is a discharge of the others, because by this discharge the holder has taken away the right to proportional relief which these others would have had on paying (b). If, however, the release granted to the acceptor who is discharged, contain an express reservation of the holder's rights against the other acceptors, that prevents the deed from being a charge to them, because the discharged party's consent that the holder should have recourse against the others, is also a consent that these others should have their recourse against him (c). But when the joint acceptors are cautioners, they are, even in such a case, freed by the express terms of the Mercantile Amendment Act (d). And when they are cautioners, the release without the consent of the others, even of one of them who is bankrupt, during the currency of the cautionary obligation, releases these others, unless there is a new agreement by them to continue the obligation after this material change of circumstances on their sole responsibility (e).'

Discharge of joint obligants or of cautioners.

Though the holder has, on granting such a discharge, got a private composition from the party receiving it, to the full amount of his funds, it will still be held that, by granting a discharge which was to cut off the relief of other parties, without consulting them, he virtually intimated that he assumed the sole interest, and

Discharge on composition.

(a) Story, § 269.

(b) *Nicholson v. Revill* (K. B. 1836), 4 A. and E. 675. This was the case of a joint and several promissory-note, and an express release to one of the makers was held a release to all. It was decided on the authority of *Cheet- ham v. Ward*, 1 B. and P. 360.

(c) *Lewis v. Anstruther*, 17 Dec. 1852, 15 D. 260; *Kearsley v. Cole* (Ex. 1847), 16 M. and W. 128; *Price v. Barker* (Q. B. 1855), 4 El. and B. 760.

(d) 19 & 20 Vict. c. 60, § 9.

(e) *British Linen Co. v. Thomson* 25 Jan. 1853, 15 D. 314.

that his claim against them was abandoned. This doctrine has been accordingly adopted in England, where it has been repeatedly decided that the holder of a bill or note releases the indorsers by discharging the acceptor or granter on payment of a composition, and that whether the composition was all which could be got from the acceptor's funds or not (a). But this doctrine does not appear to be quite settled in Scotland. It was held that the indorser of a note, having been discharged under a sequestration, and a composition of 4s. 6d. per pound, was not released from payment of that composition, by the fact, of which he said he was not previously aware, that the holders had agreed to discharge the granter on a private composition of 12s. per pound (b). It is not easy to reconcile this decision with the foregoing principles, especially as the grounds of decision are not given. But it probably proceeded on the ground (which was pleaded), that the agreement for 4s. 6d. went on the implied understanding, that the holders should be at liberty to take as much as they could get from the other obligors. In another case (c), relating to a bond in which, though both the obligants were *ex facie* principal debtors, one of them was, to the holder's knowledge, only cautioner, it was decided that the holder's recourse against the cautioner was preserved, though he had discharged the principal on payment of a private composition. But this decision proceeded on the ground that the discharge to the principal, according to the true construction of it, was not to the effect if the cautioner was to be thereby liberated. In another

(a) This point has been settled by the case of *Wilson ex parte*, 11 Ves. 410, where the holder's agent had signed a discharge of the acceptor at Hamburgh, on payment of a composition, under a mistaken impression that the proceedings were carried on there judicially as in a commission of bankruptcy. The Lord Chancellor, without regarding this circumstance, held, that by granting the discharge without consulting the drawer, the holder had released his estate. Similar doctrine was adopted by Thurlow, in *Smith ex parte*, 3 Br. C. C. 1, where the holder of a certain bill and note was found

to have released the indorsers by discharging the acceptors and makers on payment of a composition, without asking consent of the indorsers. See also *ex parte Glendinning*, Buck. 517. The same general doctrine was adopted in *ex parte Giffard*, 6 Vesey, 835, although it was held that the creditor in the note in that case, had not discharged the person from whom he had taken a composition, from the claim relief by his co-sureties.

(b) *Calder v. Borthwick*, 17 Jur. 1829, 7 S. 840.

(c) *Ogilvies v. Smith*, 22 Nov. 1853, F. C., 1 S. 159.

case (a), a reference was allowed to the oath of the chargers, whether they, knowing that the suspenders were only cautioners, had discharged the primary obligant, without their consent, on payment of a composition. But this case can hardly be quoted as a precedent.

The holder will not release the subsequent parties, by ranking on the estate of the acceptor, or any of the prior obligants, under a commission of bankruptcy in England, or in Scotland, in a sequestration under the bankrupt statute, although the bankrupt should obtain his statutory discharge on payment of such dividends as his estate yields (b). In Scotland, where the bankrupt statute authorizes a discharge, with concurrence of a certain proportion of the creditors, not only on a division of the estate among the creditors, but on payment of, or security given for, a composition, it has been decided, with reference to a debt secured by a letter of guarantee, that the creditor's concurrence in the principal debtor's discharge, on payment of a composition, though without him there could not have been the requisite concurrence of creditors, and though he did not ask the guarantee's consent, did not liberate the latter (c). And the principle of this decision was afterwards confirmed and extended by an express provision of the Bankruptcy Act. Under the 56th section of that Act (d), a creditor who has an obligant bound to him along with the bankrupt, for the whole or part of the debt, does not free the obligant, by any vote he may give or dividend he may receive under the Act, or by assenting to the discharge of the bankrupt, or to a composition. The interests of the obligant are protected, in case he should fear that the creditor would not sufficiently attend to them, by putting it in his power to pay the debt, and obtain an assignation, and then enter a claim on the estate on his own account.'

Discharge in sequestration under Bankruptcy Act.

2. Indulgence.

The doctrine now explained as to the effect of a discharge by

An agreement to give time to a prior obligant releases the subsequent

(a) *Hunter v. Evans*, 26 Nov. 1830, 9 S. 76.

Mawson, 1 Bos. and Pull. 286; and in Lord Eldon's opinion in *English v. Darley*, 2 *ibid.* 61.

(b) This doctrine, with reference to an English commission of bankruptcy, is implied in the case of *ex parte Wilson*, 11 Ves. Jun. 411; in *Stock v.*

(c) *Whitelaw v. Steins*, 20 May 1814, F. C.

(d) 19 & 20 Vict. c. 79, § 56.

the holder to the debtor, or any other obligant, in releasing the subsequent parties, is equally applicable when he agrees to grant indulgence to a prior party, whether with or without a new security to the debt. Such indulgence restricts in part, as a simple discharge does away with, the relief competent to subsequent parties against a party who gets the indulgence; since their claim of recourse, being *immediate*, is impaired by the holder agreeing that the party shall not be sued for a certain time. By doing so, therefore, without consulting them, he is held, as by a simple discharge, to abandon virtually his claim against them, with which their right of relief is commensurate (a). Besides, it is presumed that, by getting from the acceptor, or any other party, is rendered less active in exerting himself to discharge the bill or note, and thus relieve the subsequent parties, than if he had been liable to immediate action or diligent. Accordingly, in an action in Scotland by the holder of a bill against the drawer, the latter was assoilzied, on this ground, *inter alia*, that the holder had taken a new bill from the acceptor, including the sum in the former bill, payable at a later date, and had thus propagated the term of payment as to the acceptor (b). In another case (c) of a circumstantial nature, where it appeared that one of several original bills by the principal debtor had been given up by the creditor, and a new bill taken for its amount, with the omission of one of the obligants in the first bill, it was decided by the House of Lords, that a party who had signed a cautionary bill, binding himself for several bills, and for this first bill, *inter alia*, was released from that part of his engagement.

The same rule has been adopted in a number of English cases. Thus, in an action by the holder of a note against the indorser, the defendant was found not liable, as the holder had repeatedly given time to the maker of the note between 5th May, which was the last day of grace, and 14th May, when he became bankrupt (d). It

(a) *Vide* opinion of Bayley, J., in *Claridge v. Dalton*, 1815, 4 M. and S. 232; and of Lord Ellenborough, in *Gould v. Robson*, 1807, 8 East. 576. *Vide* also *Bank of Ireland v. Beresford*, 6 Dow, 233; and *Moss v. Hall* (Ex. 1850), 5 Exch. 46.

(b) *Flower v. Pringle*, 18 Dec. 1729, Morr. 1560.

(c) *Stirling v. Bank of Scotland*, 1 June 1821, 1 Sh. Ap. Ca. 37.

(d) *Anderson v. George*, 1757, per Lord Mansfield, Selwyn's Nisi Priu 386-7. A similar opinion as to the effect of giving time to the maker of note in releasing the holder, is expressed by Buller, J., in *Tindal v. Brown*, 1786, 1 T. R. 157.

in another case (a), where the holder of a bill, after getting judgment against the acceptor, had, on receiving from him a partial payment, taken his bond and warrant of attorney for the whole balance, excepting a nominal sum, payable by instalments, he was found to have thereby discharged the indorser, and was therefore non-suited in an action against him. Again (b), where the holders of a bill had not only taken a partial payment from the acceptor, which they were held entitled to do, but had agreed to draw an additional bill on him for the balance, payable at a longer date than the first, which they also retained in the meantime as an additional security, they were non-suited in an action against an indorser, for having thus given time to the acceptor. 'And where a holder, in consideration of a payment of 30s., agreed to leave the acceptor time for a month, the drawer was held to be discharged (c).' On the same principles, an agreement to give indulgence to an indorser of a bill or note would release the subsequent indorsers, as it abridges, without their consent, their claim of relief against the party thus indulged (d).

When there is no direct agreement to give time, the other parties will not be discharged by the holder merely taking a bill or note from the acceptor or granter, payable at a longer date than the first, without giving up the first, because the new document will be held to be merely a collateral security, unless there is an agreement expressed or implied in the transaction, that it should supersede the

Effect of taking additional security, without agreeing to give time.

(a) *English v. Darley*, 1800, 2 Bos. and Pull. 61, per Lord Eldon, C. J., whose opinion was afterwards confirmed by the Court of Common Pleas.

(b) *Gould v. Robson*, 1807, 8 East. 576. In this case Lord Ellenborough delivered the opinion of the whole Court of King's Bench. A similar doctrine as to the effect of such a proceeding is laid down in an early case, *Claxton v. Swift*, 1685, 3 Mod. R. 86. Vide also *Smith v. Beckett*, 1810, 13 East. 187.

(c) *Isaac v. Daniel*, 29 Jan. 1846, 15 L. J. (Q. B.) 149.

(d) In *Smith v. Knox*, 1799, 3 Esp. 48, Lord Eldon, C. J., intimates his

opinion, that the holder, if he discharges a prior indorser, will probably find it difficult to recover against a subsequent one. In *English v. Darley*, 1800, 2 Bos. and Pull. 62, the same Judge says, "Had the plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser." The same principle evidently applies as to the effect of giving time to a prior indorser on the holder's claim against subsequent indorsers. See also *Clark v. Devlin*, 1803, 3 B. and P. 363, and *Heylin v. Adamson*, 2 Burr. 674.

first. This was decided in an English case (*a*), where it was found that the holder of a bill, by taking another bill from the acceptor payable at a later date, but without a stipulation to give time, did not discharge or limit the claim on the former bill; and on that ground, although he had raised money on the second bill by discounting it, it was decided that another party, who had got the first bill from him by indorsement, was entitled to sue the drawer on it before the second bill became due. The same doctrine appears to have been followed by the Court of Session, in a case where the cautioners of a bank agent were found not to be released by the circumstance of the bank taking a new promissory-note from the agent (payable at Martinmas next) for the amount of certain bills discounted by them, and for which they were liable, but under reservation of the effect of all prior securities, and *inter alia* of the bond, by virtue of which the cautioners were liable (*b*). But this decision was reversed on appeal, Lord Gifford holding that the terms of the note were such as to amount to a giving of time by the bank. In another case (*c*), it was decided that the holders of two bills subscribed by one party as drawer, and another as acceptor, did not lose their recourse against the drawer, merely by taking notes from the acceptor alone for the same sum, but without giving up the former bills, or making any stipulation not to do diligence on them. The doctrine held both in Scotland and in England appears to be, that the holder shall be considered as retaining all his rights over the first bill, notwithstanding his acceptance of an

(*a*) *Pring v. Clarkson*, 1822, 1 B. and Cr. 16, *per* Abbott, C. J., and Bayley, Holroyd and Best, J. But *vide* remark on this case in Bayley, 245. *Vide* also *Arundel Bank v. Goble*, 1817, Chitty, 290; *Philpot v. Bryant*, 4 Bingh. 717; and *Boulbie v. Stubbs*, 18 Ves. 20, which is the case of a bond.

(*b*) *Thomson v. Bank of Scotland*, 29 Jan. 1822, F. C., 11 June 1824, 2 Sh. Ap. Ca. 316.

(*c*) *Allan v. Laidlaw*, 3 Dec. 1824, 3 S. 356. The same doctrine was held in *Sandeman v. Thomson*, 12 Nov. 1831, 10 S. 4. 'It is to be observed that the

circumstances of the first of these cases showed very plainly that the notes were given only as additional securities; and that, in the second, the renewal bill was apparently obtained and transmitted to the holder by the drawer of the first bill, and that it would therefore have been unjust to have allowed the latter to plead that he was liberated by an indulgence to which he had himself consented. If they are to be taken as deciding the general question as laid down in the text, they would seem to conflict with *Flower v. Pringle*, 18 Dec. 1729, M. 1560, quoted p. 390, n. (*b*).'

additional security, unless he agrees, expressly or by necessary implication, to limit these rights (a). 'It is clear that taking an additional security from the acceptor without any agreement, express or implied, for delay, can have no effect in exonerating the other parties (b).'

No indulgence, however, to subsequent indorsers will release prior indorsers, because the latter have no claim against the former which can be cut off (c). For the same reason, indulgence to the payee will not release the drawer (d), nor will such indulgence to the drawer release the acceptor (e). Farther, if the holder of a bill or note takes a security from, and gives delay to one of several parties who are bound in the same character—for instance, to one of several drawers or acceptors—provided he does not agree to rely on his credit alone, but reserves his claims against the others, he will not thereby release any of them, as they have no claim of relief that can be injured by his indulgence, such as a subsequent indorser has against a prior one (f), but have claims of mutual relief independent of the bill. The same rule appears to have been adopted by the Second Division of the Court of Session in a case which was affirmed on appeal to the House of Lords, where the holder of a note granted by two parties jointly was found entitled to recover the full amount from one of the obligants, although he

Indulgence to a subsequent obligant, or to a co-obligant.

(a) 'Chitty (p. 287) questions the law as thus laid down, and submits that the mere receiving further security from the acceptor, payable at a future day, in general implies an engagement to wait till it becomes due, and accordingly releases the indorsers. Where the prior debt is unconstituted, it is clear (*antea*, p. 97) that taking a bill suspends the remedy till maturity; and it should make no difference in principle that the prior debt is itself a bill, for the taking of a second bill at a more distant date can have no other (legitimate) meaning than that the party giving it is to get further time.'

(b) Story, § 427; and cases cited *antea*, p. 386, note (c), and *postea*, p. 394, n. (f).

(c) This was decided by Lord Eldon,

C. J., in *Hayling v. Mulhall*, 1778, 2 Bl. 1235. Similar doctrine was laid down by Bayley, J., in *Claridge v. Dalton*, 1815, 4 M. and S. 232-3.

(d) *Claridge v. Dalton*, note (c).

(e) *Ferguson v. Gordon*, 9 July 1825, 4 S. 165.

(f) This doctrine was established by the Court of King's Bench in *Bedford v. Deaken*, 2 B. and A. 210, where it was found that the holder of two bills drawn by three parties, having taken promissory-notes from one of the parties for their amount, payable at a later date, but retaining the original bills, and reserving his claim against the two other drawers, did not thereby release them from this claim, seeing all the several drawers were from the first equally liable to it.

had repeatedly taken renewals of a separate bill from the other obligant for the same debt, always retaining possession, however, of the original note (*a*).

Agreement
with a third
party to give
time.

When ultimate diligence has been raised on a note against both drawer and acceptor, and a third party then grants a bill of his own at six months for the debt, at the acceptor's request, but under condition of being assigned to the first bill and diligence, the drawer cannot plead that he is discharged from the first bill, by time being given to the acceptor during the currency of the second bill (*b*). The doctrine of giving time seems not applicable to an interference which relieves both parties from ultimate diligence. 'In England it has been broadly laid down, that time given to the acceptor in consequence of an agreement between the holder and a stranger, does not release the other parties (*c*).'

Mere forbear-
ance.

The holder's mere forbearance to sue the acceptor or other parties, will not release the subsequent parties, provided he does not bind himself to give indulgence (*d*). It has been held, for instance, that he will not prejudice his claim against the other parties by receiving proposals for a security from the acceptor (*e*), or even by taking farther security, if no time is given on the original bill or note (*f*), or by taking partial payments, and offering to take the balance by instalments, under a condition which is never fulfilled (*g*), or by levying a partial payment from one of the obligants (*h*), or by merely stating, in a letter to the indorsers of a note, that the granter would not be ready to pay for a week, which would be time enough for him, since that did not amount to any agreement with the *granter himself*, to give him time (*i*). It has been even decided that the drawer will not be discharged by the holder agreeing, after protest for non-payment and notice, or what is equivalent to it, not to press the acceptor. But it may be doubted whether such an agreement, if binding, is not as objectionable as a more precise one

(*a*) *Edgar v. Robinson*, 11 May 1826, 2 W. and S. 106.

(*b*) *Leslie v. Shepherd*, 22 Feb. 1833, 11 S. 436.

(*c*) *Fraser v. Jordan*, 4 July 1857, 26 L. J. (C. P.) 288.

(*d*) *Per Eyre*, C. J., in *Walwyn v. St Quintin*, 1797, 1 Bos. and Pull. 655.

(*e*) *Walwyn v. St Quintin*, note (*d*)

(*f*) *Twopenny v. Young*, 3 B. Cr. 208.

(*g*) *Hewet v. Goodrich*, 1 C. Pay. 468.

(*h*) *Ayrey v. Davenport*, 1807, 2 B. and P. N. R. 476.

(*i*) *Margeson v. Goble*, 1816, Chitty's R. 264.

so far as it fetters the right of the subsequent indorsers to enforce their relief against the acceptor.

In an English case (*a*), it was decided that a holder did not discharge the drawer by agreeing to give time to the acceptor, on getting another security from him, after judgment had been obtained against both drawer and acceptor. The Court held, that the rule as to the effect of indulgence to the acceptor, in releasing the drawer, does not apply after judgment. Perhaps the same doctrine would be adopted in Scotland, after decree has been obtained, or the protest recorded on a bill or note against all the parties, on the ground that each party, being then liable directly to the holder, thus acquires an absolute right of relief against the prior parties, of which no transaction between them and the holder can deprive him.

Giving time
after judgment.

It has been decided that the holder, after payment was refused by the acceptor, and all the proper steps of negotiation taken in consequence, did not discharge the drawer by offering to retain the bill a few days longer, in the prospect of still getting payment from the acceptor (*b*). In another case (*c*), where the holder of a bill, after it had been protested for non-payment and due notice given, proposed, through his attorney, to give time to the acceptor, on receiving a certain payment, which, however, was not made, so that the proposal did not take effect, and there were merely some partial payments made unconditionally, it was found to afford no ground for discharging an indorser, that he had got no notice of this proposal, with what followed on it, or of the ultimate non-payment of the balance.

Offers to give
time.

No objection can be made on any of the grounds now stated, if the objector has given his assent to the indulgence (*d*). For instance (*e*), where the holder of a bill asked the indorser's consent to give the acceptor time to pay it by instalments, and the indorser answered that he might do as he liked, since he (the indorser) was discharged for want of notice of non-payment, it was afterwards found, on the notice being held sufficient, that these expressions

Indulgence
given with
obligant's
consent.

(*a*) *Pole v. Ford*, 1816, *ibid.* 125.

(*d*) *Cairns' Trs. v. Brown*, 23 June

(*b*) *Forster v. Jurdicson*, 1812, 16
East. 105.

1836, 14 S. 999.

(*e*) *Clark v. Derlin*, 1803, 3 Bos.

(*c*) *Badnall v. Samuel*, 3 Price, 521. and Pull. 363.

implied a consent by the indorser that the holder should give time to the acceptor. Perhaps it may be doubted whether such consent was sufficiently indicated. It has been farther decided, that even a subsequent promise to pay, after knowing that time had been given, excludes the objection. Thus (*a*), where the drawer of a bill defended himself against an action by the indorsee, on the ground that the latter had repeatedly given time to the acceptor, it was held to be a good answer, that the defendant, after hearing that time had been so given, said to the plaintiff, "I know I am liable and if Jones" (the acceptor) "does not pay, I will." The principle seems to have been here adopted as to the plea of indulgence, which was already explained regarding want of notice, viz., that it amounts only to a personal objection, which the party renounced by a subsequent promise of payment. In another case (*b*), it seems to have been held at *Nisi Prius*, that the drawer of a bill was barred from objecting that time had been given to the acceptor, by a party to which he had promised to sign, consenting to the holder using any means that he could to recover payment from the acceptor, without prejudice to his rights against him (the drawer). But (*c*), where the holder of a bill had taken another bill instead of it from the acceptor, which was never satisfied, and his indorser, to whom the acceptor mentioned that he had taken up the old bill by a new one, answered that it was the best thing which could be done, it was held that such a remark did not preclude the indorser, in a question between him and the holder, from pleading the indulgence given to the acceptor, as his remark was presumed to refer to the advantage of the arrangement to the acceptor, and not to imply a ratification of it as to the holder.

Silence taken
for consent.

'If an obligant be consulted as to the propriety of giving time, and he return no answer, his silence may be taken as consent, if the delay be a reasonable one in the circumstances.' When a party having a claim against several persons, jointly and severally, but who knew that one of them was liable to the others in total relief, consulted them as to the expediency of granting this party indulgence, but received from one of them no answer, and then took

(*a*) *Stevens v. Lynch*, 1812, 12 East. 38.

(*b*) *Hill v. Johnson*, 3 C. and P. 1417.

(*c*) *Withall v. Masterman*, 2 Camp. 179, per Lord Ellenborough.

Note from the principal party, at nine months, to which two of the others agreed, it was decided, that as the third had, by silence, left him to deal as he thought best, he could not plead that he was discharged by giving time (a).

§ 53. *Effect of Discharge or Indulgence in Accommodation-Bills and Notes.*

What has been now stated assumes that the subsequent parties to a bill or note have recourse against the prior party who has got a release, or received indulgence from the holder, and that their recourse is presumed to have been thereby injured. But when they have no such recourse, though entitled to it *ex facie* of the bill or note, they cannot plead that they are released, because the presumption of injury is then done away. For instance, the drawer of a bill accepted merely for his accommodation, and without effects of his in the acceptor's hands, cannot plead that he is discharged by the holder giving time to the acceptor (b). It has been also found, that such a proceeding by the holder affords no objection against his proving for such a bill on the drawer's estate (c). In another case, where the defendants had, to pay the plaintiffs for the price of goods, drawn a bill in their favour on their own agent in London, who, though he accepted the bill, did not pay it when due, as he had not then cash belonging to his constituents, but only goods, which he could not sell, it was found that the plaintiffs did not discharge the defendants by allowing him twice to renew the bill without notice to them (although he at last failed, with funds of theirs more than sufficient to pay the bill), seeing that such renewal was in their favour, because he had no funds when the bill became due, and was therefore truly a surety for them (d). Nor can such objections be pleaded by a subsequent indorser for whose accommodation a bill or note has been accepted or granted, though release or indulgence be given to a prior party. The same rules

Release or indulgence to party giving the accommodation.

(a) *Aikman v. Fisher*, 24 Nov. 1835, 14 S. 57.

(b) *Per* Lord Ellenborough in *Collet v. Haigh*, 1812, 3 Camp. 281, stated *antea*, p. 236, note (a).

(c) *Per* Lord Chancellor Eldon in

ex parte Holden; *Cooke's Bankrupt Law*, 167.

(d) *Per* Lord Ellenborough in *Clark v. Noel*, 3 Camp. 441. His Lordship's opinion was afterwards affirmed by the Court of King's Bench.

are applicable on this subject which have been explained as to notice or negotiation in similar cases (a).

Release or
indulgence to
party obtain-
ing the accom-
modation.

But it does not follow, that because parties who are principal debtors *ex facie* of a bill or note may be sureties as to other parties, the holder therefore loses his claim against them as principal debtors, by giving indulgence to the parties for whose accommodation they are bound; for example, that the holder of a bill or note accepted or granted for behoof of the payee, forfeits his claim against the acceptor or granter, by giving indulgence, or a discharge, without his consent, to the payee. 1st, There is no ground for such a doctrine, if he is not aware of the true nature of the bill or note; because he is then only bound to look at the relations of the several parties as they appear *ex facie* of it (b). Even in England, it must be proved that his knowledge of these relations was different from what they appeared to be (c); and, in Scotland, no evidence would probably be admitted to redargue that arising from the bill, excepting his writ or oath. And, 2dly, It appears to be now settled, that, although the payee should know the relative situation of parties *inter se*, he is entitled to rely on their characters as they appear *ex facie* of the bill or note, and therefore preserves his claim at all times against the acceptor or maker as principal debtor, whether he has given indulgence or not to the other parties for whose accommodation he became bound. Accordingly (d), where the holder of a note, knowing that it was granted for the payee's accommodation, had become bound, on receiving a composition from

(a) *Antea*, p. 373 *et seq.*

(b) In *Carstairs v. Rolleston*, 1814, 5 Taunt. 551, the holder of a note granted for the payee's accommodation was held not to have discharged the maker by releasing the payee, it not being proved that the holder knew that the note was granted for the payee's accommodation. In *Dingwall v. Dunster*, 1779, 1 Doug. 247, the holder of an accommodation-bill, who knew only *after it became due* that it was accepted for the drawer's accommodation, was found not to have discharged the acceptor by applying first to the drawer, and allowing several years to elapse before he asked the ac-

ceptor. But, 1st, He did not expressly agree to give time to the drawer; and, 2dly, As he did not know of the accommodation at the time of taking it, he could not be bound to observe any rules of negotiation but such as arose from the relative situations of the parties as appearing *ex facie* of the bill. The general rule laid down on this subject in *Ellis v. Gallindo*, cited in a note to 1 Doug. 249, is said to have been the same, although the circumstances of the case led to a different decision.

(c) *Vide* preceding note.

(d) *Mallet v. Thompson*, 1804, 5 Esp. 178. The same doctrine seems to be implied as to the effect of releasing the

e payee, not to molest him, it was decided, notwithstanding, that had not thereby lost his claim against the maker. The same doctrine, as already shown (a), although at one time doubted, has been settled, regarding the holder's claim against the acceptor of an accommodation-bill, though he has given time to other parties on the bill who were liable in relief to the acceptor. In like manner, releasing or giving indulgence to a subsequent indorser would not cut off his claim against a prior one, although he should be aware that the former, as the party accommodated, was liable in recourse to the latter. In all these cases, the claim of recourse does not arise on the face of the bill or note, but from an agreement independent of it. But the *holder's* claim arises from the bill or note alone, and therefore, though he should discharge *this* claim, or give time for the payment of it, he will not thereby discharge or fetter any other party as to the time of enforcing a distinct claim of recourse, independent of the bill or note (b).

indorser of bills on a composition-contract, in not discharging an accommodation-acceptor, in *Maltby v. Carstairs* (Q. B. 1828), 7 B. and Cr. 735. *Vide* also *Price v. Edmonds* (Q. B. 1830), 5 B. and Cr. 578 (overruling *Laxton v. Peat*, 1809, 3 Camp. 185). The doctrine was also recognised in Scotland in *Mowbray v. White*, 17 June 1824, 3 S. 146, where it was decided that the pursuer had a good claim against the acceptor of an accommodation-bill which he had retired, and in which the acceptor had also given him a separate obligation, although he had taken a bill from the drawer for part of the same debt, still, however, retaining the original bill and the acceptor's obligation.

(a) *Antea*, p. 235.

(b) *Vide* Lord Ellenborough's opinion in *Mallet v. Thompson*. 'The text, in the above paragraph, lays down correctly the doctrines formerly held by

the Courts of Law in England. But the Courts of Equity have held themselves entitled to disregard the form of the instrument, and the liabilities thence appearing, and to liberate the surety wherever the holder knowingly gives time to a principal, even though the surety should be the acceptor of the bill, and the principal the drawer; thus reversing the ordinary rules. (*Per* Cottenham in *Hollier v. Eyre*, 9 Cl. and F. 45; *Davies v. Stainbank*, 6 De G. M. and G. 679.) And recently a similar power has been exercised in the Court of Queen's Bench (*Pooley v. Harradine*, 7 E. and B. 431). In Scotland, it has been doubted whether a creditor who knew that one of two co-acceptors was a cautioner, would not discharge him by giving up securities to the other acceptor who was principal debtor (*Aitken v. Callender*, 10 June 1848, 10 D. 1269).'

CHAPTER VII.

OF ACTION AND DILIGENCE ON BILLS AND NOTES.

BILLS and notes, like other obligations, form in Scotland the ground of a personal action at common law. But statute has established a summary mode of execution to enforce payment of them, without an action; and this statutory process is applicable to almost every case of bills and notes. It will be proper, before detailing the nature and requisites either of this summary process or of procedure by action, to distinguish the cases which fall under each respectively, after describing the leading features of the summary process.

1. *Introduction and Nature of Summary Diligence.*

Limited summary diligence on foreign bills by 1681, c. 20.

The process summary was first introduced as to foreign bills. By the Act 1681, c. 20, which proceeds on the narrative, "His Majesty being informed that it is necessary it is for the flourishing of trade, that bills or letters of exchange be duly paid, and have ready execution, conform to the custom of other parts;" it is enacted, "That, in case of any foreign bill of exchange, from or to this realm, duly protested for non-acceptance or for non-payment, the said protest, having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill, in case of non-acceptance, or after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser in case of a protest for non-acceptance, or against the acceptor in case of a protest for non-payment."

to the effect it may have the authority of the judges thereof interponed thereto, that letters of horning upon a simple charge of six days, and executorials necessary, may pass thereupon, for the whole sums contained in the bill, as well exchange as principal, in form as effeirs, sicklike and in the same manner as upon registrate bonds, or decreets of registration, proceeding upon consent of parties; providing always, that, if the saids protests be not duly registered within six months, in manner above provided, then, and in that case, the said bills and protests are not to have summary execution, but only to be pursued by way of ordinary action, as accords; and farther, that the sums contained in all bills of exchange bear annual-rent, in case of not acceptance, from the date thereof, and, in case of acceptance and not payment, from the day of their falling due, ay and while (until) the payment thereof." It is also declared, That, notwithstanding of the foresaid summary "execution provided to follow upon bills of exchange, for the sums therein contained, in manner above specified, yet it shall be leasom (lawful) to the party charger to pursue for the exchange, if not contained in the said bills, with re-exchange, damage, interest, and all expenses, before the ordinary judge, or, in case of suspension, to eik (add) the same to the charge at the discussing of the said suspension, to the effect that the same may be liquidat, and decret given therefor, either against the party principal, or against him and his cautioners, as accords."

The Act 1696, c. 36, referring to this statute, enacts, "That the same execution shall be competent, and proceed upon inland bills or precepts, as is provided to pass upon foreign bills of exchange, by the 20th Act of the Third Parliament of Charles II., holden *in anno* 1681, which Act is hereby extended to inland bills and precepts in all points."

And on inland bills, by 1696, c. 36.

These two Acts, the first relating to foreign, and the second to inland bills, authorize summary execution, 1st, Against the drawer and indorsers, on non-acceptance; and, 2^{dly}, Against the acceptor on non-payment. In the first of these cases, summary diligence is allowed, after registering the protest, at any time within six months after the date of the bill, whether before or after the term of payment. Accordingly, in the case (a) of a bill dated 10th

(a) *Cowan v. Kay*, 20 June 1795, M. 1621.

March 1795, and payable 90 days after date, or on 11th June, but of which acceptance was refused on 28th March, the Court sustained a charge of horning given to the drawer on 28th May. In this case the same rule was enforced, agreeably to the statute, regarding summary diligence, which has been laid down (a) regarding the holder's right at common law to bring an immediate action against the drawer or indorsers on non-acceptance.

Extended to notes and made complete by 12 G. III. c. 72.

Summary diligence was not competent, by these Acts, on non-payment, unless against the acceptor; and there was no recourse, in such a case, against the drawer and indorsers, but by action. But the Act 12 Geo. III. c. 72, § 42 (made perpetual on this subject by 23 Geo. III. c. 18, § 55), remedied both this and another defect, by allowing the like remedies on promissory-notes as on bills, and by enacting that there should be summary execution against the drawers and indorsers of bills and the indorsers of notes, for non-payment as well as for non-acceptance. As to promissory-notes, it enacts that "the same diligence and execution shall be competent, and shall proceed upon promissory-notes, whether holograph or not, as is provided to pass upon bills of exchange and inland bills, by the law of Scotland; and that promissory-notes shall bear interest as bills." As to summary execution, in case of non-payment, against drawer and indorsers, the same statute enacts, that "summary execution by horning or other diligence, shall pass upon bills whether foreign or inland (b), and whether accepted or protested for non-acceptance and upon all promissory-notes duly negotiated not only against the acceptors of such bills, or granters of such notes, but also against the drawers of such bills, and the whole indorsers of the said bills and notes jointly and severally, excepting where the indorsation is qualified to be without recourse, saving and reserving to the drawer or indorsers their respective claims of recourse against each other and all defences against the same, according to law." According to this clause, summary execution on non-payment is competent against the drawer and indorsers of a bill and the indorsers of

(a) *Antea*, p. 384.

(b) This expression, "foreign or inland," includes all bills, and there is no third class of "foreign inland bills" on which summary diligence is incom-

petent. See *Don v. Kealey*, 13 Jun. 1850, 12 D. 1016, and *Mackenzie v. Hall*, 12 Dec. 1854, 17 D. 164, cited *antea*, p. 2.

note, as well as against the acceptor or granter, all at the same time (a).

2. When Summary Diligence competent.

It is proper to point out the cases in which summary execution is, or is not, competent by the statutes.

It is not competent, either on non-acceptance or non-payment, unless the instrument of protest for non-acceptance or non-payment has been completed and registered in the books of some competent court within six months, viz. the protest for non-acceptance in six months after the date of the bill, and the protest for non-payment in six months after the term of payment of the bill or note. 'The words of the Act in the latter case are, "after the falling due thereof;" and accordingly it has been held, that the period of six months, in the event of non-payment of bills payable on demand, runs from the date of the demand, and not, as has sometimes been supposed, from the date of the bill (b). It would run from this date in the case of a bill payable at sight, and accepted by an undated acceptance, because such a bill would fall due as soon as it was accepted, and the acceptance, being undated, would be presumed to be of the date of the bill (c). The Court has no power to extend the period of six months under any circumstances (d).'

Summary diligence not competent unless protest registered within six months.

It has been shown (e), that the holder of a bill payable at a certain date may preserve his recourse against the drawer and indorsers, by presenting it for payment when it falls due, and protesting it for non-payment only, although not accepted. His right

Diligence on protest for non-payment where no presentment for acceptance.

(a) As mentioned in the introduction (p. 5), there is now a system of summary diligence in England, as well as in Ireland.

(b) *M'Rostie v. Halley*, 19 July 1849, 12 D. 124; *Bon v. Rollo*, 21 Feb. 1846, 12 D. 1310. Under the English Summary Diligence Act, 18 & 19 Vict. c. 67, § 1, where the words are, "within six months after the bills or notes shall have become due and payable," it was held that the time in the case of a note payable on

demand ran from its date; *Maltby v. Murrels*, 23 May 1850, 29 L. J. (Ex.) 377.

(c) *Moffat v. Marshall*, 31 Jan. 1838, 16 S. 406.

(d) *North British Bank v. Thom*, 18 July 1848, 10 D. 1505. Part of the delay in presenting for registration in this case was caused by the acceptor having obtained an interdict in the Sheriff Court against the holder doing so.

(e) *Antea*, p. 275.

in such a case to summary execution against the drawer and indorsers, depends on the terms of the statutes; but these must be interpreted with reference to the rules of common law. On this subject, the Act 1681, c. 20, enacts, that a protest for non-acceptance shall be registered within six months after the date of the bill, to authorize summary execution against the drawer or indorsers, and that, "if the said protests be not duly registered within six months, in manner above provided," there shall be only an ordinary action on the bill. The Act 12 Geo. III. c. 72, likewise supposes, in the event of bills not being accepted, that there is a protest for non-acceptance. This, however, though assumed to be the practice, is not expressly required by the statute, where it is not intended to have recourse against the drawer and indorsers for non-acceptance, but merely for non-payment; and as a protest for non-payment is alone necessary, in that case, at common law, it would seem that the statute, in allowing such recourse to be enforced by summary diligence, does not go beyond the common law, or render necessary for that purpose the taking and registration of more than a protest for non-acceptance. In one early case of non-acceptance (a), it is said to have been decided, that a protest for non-payment, registered within six months after the term of payment, was sufficient to authorize diligence against the drawer. But the principle of this decision is not explained; and it is not easy to perceive its principle under the statutes then subsisting, which allowed summary diligence only against the acceptor for non-payment. But the question now stated must be decided by the statute 12 Geo. III. c. 72, § 41, as combined with the previous statutes, and the rules of common law.

Remedy by ordinary action, when summary diligence incompetent.

If the protest for non-acceptance or non-payment is not registered within the time and in the manner prescribed by the statutes, there can be no recourse either against the drawer, indorsers, or acceptor, except by means of an ordinary action. But, in some cases (b), where summary diligence on bills was suspended, on the ground that the bill had not been protested till after the six months, or on the ground of nullity in the diligence, the charge was notwith-

(a) *Yuill v. Richardson*, 25 July 1699, Forbes, 134.

(b) *M'Cready v. Crawford*, 23 July 1712, Morr. 11984; *Gordon v. Milne*

and *Co.*, 13 Feb. 1822; *Reid v. Fraser*, 4 Feb. 1825, F. C.; *Douglas v. Smith*, 9 Feb. 1830, 8 S. D. B. 873.

converted into a libel. This cannot, however, be done if the charge proceeds on a protest null under the stamp laws (*a*), the bill is vitiated (*b*), or where the bill is for a sum less than £5, which could not be sued for in the Court of Session (*c*), or where the record has been closed in a suspension (*d*).

If a party resorts to an ordinary action, he cannot, so long as the bill is in dependence, use summary diligence. Being of the nature of a process, summary diligence is excluded in this case by the plea of *lis alibi pendens*.

After resort to ordinary action, summary diligence is incompetent.

On the same ground, if a party begin summary diligence, and then leave it off, to use the ordinary remedy, or recommence the summary process (*e*). If the ordinary process is concluded, so as to obviate the plea of *lis alibi pendens*, and the party is in a position to raise the plea of *res judicata*, it would be competent to revert to the summary process.

Summary execution is competent only for the amount of the bill, with interest from its date in case of non-acceptance, or the term of payment in case of non-payment; as also for any other sum, if specified in the bill. But such a sum, whether for exchange, re-exchange, damages, interest, or when not specified in the bill, can be recovered only by ordinary action. 'The right to bring this action is reserved in the Act, c. 20. If there should be a suspension, the Act also empowers the holder to make the claim, by adding it to the charge on the bill, to the effect that it may then be liquidated, and enforced therefor; but this power seems to have fallen into disuse.'

Summary diligence is competent only for the amount of bill and interest.

It has been shown, that summary execution is not competent on bills, which, though the party's name be inserted by himself or by one of them, are not subscribed by him (*f*), or which are only by initials (*g*), or by a mark (*h*).

Summary diligence on bill subscribed by initials or mark,

v. Barbour, 20 Dec. 1827, 1828, F. C.

July 1828, 6 S. 1048. 'The practice of converting the charge into a libel is obsolete.'

g v. Leiper and Scott, 1 S. and D. 446; *M'Ara*, S. and D. 360; *Forrest*, 12 S. D. B. 726.

(*e*) *Denovan v. Cairns*, 1 Feb. 1845, 7 D. 378.

t, 13 June 1834, 12 S.

(*f*) *Antea*, p. 32.

(*g*) *Antea*, p. 34.

(*h*) *Antea*, p. 34. *Vide* cases there

ell v. M'Donnell, 22 Dec. 1812; *Watts v. Barbour*,

referred to, and, *inter alia*, *M'Intosh v. M'Donald*, 8 Dec. 1828, 7 S. 155.

by notary,

The subscription of one notary and two witnesses has been held a sufficient substitute for the party's signature. But it is doubtful whether a bill or note thus subscribed could form the ground of summary diligence. Such diligence appears to be admissible only when the document is probative in itself, and not when it requires extrinsic proof, which cannot be adduced except in an action. A subscription by two notaries and four witnesses probably would form the ground of summary diligence; because it is probative *per se* (a).

per procura-
tion,

The signature of a person *per* procuration of another would also form the ground of summary diligence, when the procuration is notorious, as when the procurator has acted as such in a long course of transactions. The principal is then identified, in the mind of contracting parties, with his agent (b), and may be considered as signing through him. The notoriety, too, of the agency appears to come in place of extrinsic proof, at least so as to afford a warrant in the first place for summary diligence. Summary diligence would not probably be allowed on a signature by procuration, where the agent's power depended solely on a written procuration, seeing extrinsic proof is here necessary to make the subscription valid (c). It was decided in one case by a Lord Ordinary, though the matter did not come before the whole Court, that the subscription of a father's name by his son, who was said to have been in the habit of so subscribing, did not form a ground for summary diligence against the father (d). In another case (e), a charge was suspended, when given to a mother on a bill thus subscribed in her name by her daughter. But the Court appear to have there held, that there was no mandate, either special, or by any course of dealing, in which the mother had sanctioned this mode of subscription. In another case (f), the point was raised but not decided, it being held that the objection to summary diligence on a bill signed by procuration was excluded by the circumstance of the suspender having in his suspension waived all such objections.

(a) *Antea*, p. 30.

(b) *Turnbull v. M'Kie*, 26 Feb. 1822, 1 S. 353.

(c) *Per Ivory, Summers v. Marian-ski*, 16 Dec. 1843, 6 D. 288.

(d) *Per Lord Alloway in Sneddon v. Brown*, N. R.

(e) *Lowson v. Matthew*, 18 Nov. 1823, 2 S. 502.

(f) *M'Intosh v. M'Donald*, 9 Dec. 1828, 7 S. 155.

The signature of a partner, who has an implied power from by partner. his copartners to bind them, by subscribing the company firm, would authorize summary diligence (a). 'The holder may, on a subscription by the firm, use summary diligence against any of the partners (b).' But if partnership be denied, it must be proved, and the person against whom diligence is raised may then suspend without caution; as he ought not to be bound even to find security for the debts of a company with which he is not proved to have any concern (c).

When a bill is vitiated *ex facie*, or the suspender's signature is Vitiated or
forged bill: proved *instante* to be forged, a suspension of a charge on it will be passed without caution or consignation.

Thus (d), where a bill was vitiated in the date, the Court passed Vitiation; a suspension without caution or consignation. Again (e), a suspension of a charge on a bill was passed without caution or consignation, on a report by a banker and engraver that the year of payment had been erased or altered. 'In a third case (f), the point was fully considered, and it was deliberately affirmed, that no bill vitiated in *essentialibus* could be a warrant for summary diligence. The bill was erased in the date, and in a suspension a proof was at first allowed before answer, that the erasure had been made before issue (g); but when the case was debated on the proof, attention was more pointedly called to the previous decisions (h), and the Court then adopted the principle just stated. It was laid down as part of the more general principle, that no document which required proof, and especially parole proof, to support it, could be used to found summary diligence. In a subsequent case, it was again observed, that the document which was to serve as the foundation for the very delicate privilege of sum-

(a) *Thomson v. Liddel*, 2 July 1812, F. C.

(b) *Wallace v. Plock*, 19 June 1841, 3 D. 1047; *antea*, p. 160.

(c) *Anderson v. Bolton*, 26 Jan. 1810, F. C., and *Carlier v. Davidson*, 30 June 1810, there quoted.

(d) *Corrie v. Barbour*, 26 Nov. 1825, 4 S. 228.

(e) *Hamilton v. Kinnear*, 17 June 1825, 4 S. 102.

(f) *M' Rostie v. Halley*, 2 Mar. 1850, 12 D. 816.

(g) The proof was allowed on the authority of *Whitehead v. Henderson*, 19 Feb. 1836, 14 S. 544, it not having been observed at the moment that that was an ordinary action.

(h) *Macara v. Watson*, 3 June 1823, 2 S. 360; *Mitchell v. Stewart*, 9 June 1819, H. 78; *Forbes v. Gallie*, 4 Mar. 1847, 9 D. 806; *Brown v. Blaikie*, 1 Feb. 1849; and the cases already cited.

mary diligence, must be entirely unvitiated and unobjectionable, and the privilege was refused to a bill which had been torn in three pieces and pasted together again (a). If diligence has been carried through on a vitiated bill, it may be reduced (b). Where the appearance of the bill negatives the allegation of vitiation, there are no grounds for treating the bill differently from other bills; and the rule will be followed, that where such an allegation is not made till the last moment, and therefore appears only for the sake of delay, suspension will be refused, except on consignment (c).'

Forgery.

The Court sometimes remit to engravers to investigate the charge of forgery *comparations literarum* with writings acknowledged to be genuine (d); and on their reporting that the suspender's signature is forged, pass the suspension without caution or consignment (e). 'The Court may dispense with such a remit, if other good *prima facie* evidence of forgery be produced (f); or—especially where there has been delay in stating the defence of forgery (g)—they may refuse it, and decline to suspend the diligence, except on the usual terms of caution or consignment. Before they pass without caution of some sort, they always require to be satisfied that forgery has been committed (h). But it seems that where caution is offered, the Court will suspend on the mere allegation of forgery, provided it be timeously made (i).'

In a case (k), where a charge was given to a party described as James Wilson, "farmer at Shields," on a note drawn payable to "James Wilson," and indorsed also "James Wilson," without a designation, the First Division of the Court, in a suspension by the party charged, wherein he produced notes with his genuine signature, which appeared to be different from that in the note charged on, suspended the charge *simpliciter*, proceeding, however, on the

(a) *Thomson v. Bell*, 5 July 1850, D. 356; *Bruce v. Borthwick*, 3 Mar. 1827, 5 S. 517.

(b) *Armstrong v. Wilson*, 2 June 1842, 4 D. 1347.

(c) *Moodie v. Brown*, 22 June 1839, 1 D. 1077.

(d) *Herbertson*, 1825, N. R.

(e) *Wilson v. Hart*, 25 Feb. 1826, 4 S. 504.

(f) *Troup v. Begg*, 22 Dec. 1838, 1

(g) *Dixon v. Knox*, 27 May 1854, 16 D. 556.

(h) *Milne v. Littlejohn*, 1 Dec. 1838, 1 D. 137.

(i) *Wylie v. Brand*, 20 Feb. 1838, 14 S. 553.

(k) *Wilson v. Mitchells*, 9 Feb. 1827, 5 S. 318.

ground that, as there was no designation on the face of the bill, the notary had no warrant for charging this individual James Wilson for payment of it. It is understood that a different doctrine was held in another case (*a*) by the majority of the Second Division.

Where a bill was addressed to A. and J. Dougal and Co., and accepted by the suspenders under that description, the Court refused a suspension, which proceeded on the ground that they never traded under the firm of A. and J. Dougal and Co., but only under that of A. and J. Dougal, holding that they had adopted the former description by adhibiting it to the bill (*b*). But in the same case, they had refused the suspender a diligence in the Bill Chamber, to recover other bills which might be compared with his alleged signature, holding, it would seem, that the forgery must either be established *instante*, so as to warrant passing the bill without caution, or that it must be investigated, like other disputed allegations, after passing the bill in the ordinary form, on caution or consignment. In another case (*c*), the Court passed a suspension of a charge in a bill without caution or consignment, being satisfied of the forgery of the suspender's (or indorser's) signature, by comparing it with genuine signatures of his. The same decision was given afterwards on the same grounds, in other cases (*d*).

It has been explained (*e*), that even a written promise to accept a bill, distinct from the bill, is not in Scotland considered as an acceptance, and cannot even form the ground of an action as such, although an action may be raised on it as a separate obligation, adducing the bill *in modum probationis*. Much less, therefore, can it form the ground of summary diligence.

Summary diligence incompetent on promise to accept.

It has been stated (*f*), that drafts on bankers, if dishonoured, would not warrant summary diligence against the drawer, though an ordinary action may be raised on them. None of the statutes authorizing summary diligence apply to such drafts *nominatim*; and they cannot be considered as bills, since they are not drawn, like

Bank checks,

(*a*) *Herbertson*, Feb. 1826, N. R.

1828, 6 S. 460; *Ross v. Millar and*

(*b*) *Dougals v. Robin*, 8 Feb. 1828, 6 S. 504.

Baird, 2 Dec. 1831, 10 S. 95.

(*c*) *Paterson v. Mitchell*, 25 Nov. 1826, 5 S. 43.

(*e*) *Antea*, p. 217. This point is illustrated by a case, *Maxwell v. M'Kay*, 12 July 1699, noticed by Forbes, 140.

(*d*) *Henderson v. M'Artney*, 26 Jan.

(*f*) *Antea*, p. 120.

CHAPTER VII.

OF ACTION AND DILIGENCE ON BILLS AND NOTES.

BILLS and notes, like other obligations, form in Scotland the ground of a personal action at common law. But statute has also established a summary mode of execution to enforce payment of them, without an action; and this statutory process is applicable to almost every case of bills and notes. It will be proper, before detailing the nature and requisites either of this summary process or of procedure by action, to distinguish the cases which fall under each respectively, after describing the leading features of the summary process.

1. *Introduction and Nature of Summary Diligence.*

Limited summary diligence on foreign bills by 1681, c. 20.

The process summary was first introduced as to foreign bills. By the Act 1681, c. 20, which proceeds on the narrative, "How necessary it is for the flourishing of trade, that bills or letters of exchange be duly paid, and have ready execution, conform to the custom of other parts;" it is enacted, "That, in case of any foreign bill of exchange, from or to this realm, duly protested for not acceptance or for not payment, the said protest, having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill, in case of non-acceptance, or after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser in case of a protest for non-acceptance, or against the acceptor in case of a protest for non-payment,

the effect it may have the authority of the judges thereof interdicted thereto, that letters of horning upon a simple charge of six pence, and executorials necessary, may pass thereupon, for the whole sums contained in the bill, as well exchange as principal, in form of feirs, sicklike and in the same manner as upon registrate bonds, decreets of registration, proceeding upon consent of parties; providing always, that, if the saids protests be not duly registered in six months, in manner above provided, then, and in that case, the said bills and protests are not to have summary execution, but only to be pursued by way of ordinary action, as accords; and further, that the sums contained in all bills of exchange bear annual interest in case of not acceptance, from the date thereof, and, in case of acceptance and not payment, from the day of their falling due, and while (until) the payment thereof." It is also declared, That, notwithstanding of the foresaid summary "execution provided to be upon bills of exchange, for the sums therein contained, in manner above specified, yet it shall be leasom (lawful) to the party creditor to pursue for the exchange, if not contained in the said bills, for re-exchange, damage, interest, and all expenses, before the ordinary judge, or, in case of suspension, to seek (add) the same to the debt at the discussing of the said suspension, to the effect that the debt may be liquidat, and decret given therefor, either against the debtor principal, or against him and his cautioners, as accords."

The Act 1696, c. 36, referring to this statute, enacts, "That the same execution shall be competent, and proceed upon inland bills or precepts, as is provided to pass upon foreign bills of exchange, by the 20th Act of the Third Parliament of Charles II., passed in *anno* 1681, which Act is hereby extended to inland bills and precepts in all points."

And on inland bills, by 1696, c. 36.

These two Acts, the first relating to foreign, and the second to inland bills, authorize summary execution, 1st, Against the drawer and indorsers, on non-acceptance; and, 2^{dly}, Against the acceptor on non-payment. In the first of these cases, summary diligence is allowed, after registering the protest, at any time within six months after the date of the bill, whether before or after the term of payment. Accordingly, in the case (a) of a bill dated 10th

(a) *Cowan v. Kay*, 20 June 1795, M. 1621.

payable to the bearer, his title will appear at once from the bill being in his possession. If the bill be specially indorsed, the person must appear *ex facie* to be the indorsee. If extrinsic evidence is required to prove that the holder is the indorsee, as where the bill is payable to the agent of a certain bank, and evidence is required to show who that agent is, there can be no summary diligence. And in the few cases to be pointed out in the third article of this section, where one party is entitled to follow out summary diligence commenced by another, the fact of his having right to continue must also appear *ex facie* of the documents forming the steps of the diligence (b). Where the holder has a title not appearing *ex facie*, he must proceed by ordinary action.'

And to give such title, he may score subsequent indorsations.

It has been held in England, and also in Scotland (c), that an action may be raised on a bill or note, either by the last indorser or some previous holder (including the drawer, if the bill has been at first payable to him), provided he has first scored his own and all the subsequent indorsations (d). In a recent English case (e), an indorsation subsequent to that on which the plaintiff sued, was allowed to be struck out, by handing back the bill for that purpose, after the plaintiff's case had closed. But neither drawer, payee, or any prior indorser, can be re-invested by scoring the subsequent indorsations, when there is a receipt on the bill for its amount in favour of another indorser (f); for this receipt cannot be scored like an indorsation. Each indorsation is a separate draft, and therefore any party may hold the bill or note by virtue of one indorsation, though the rest should be scored out. But the receipt proves payment, and stops negotiability.

If holder have *ex facie* title, he is absolutely entitled to sue.

If a person appears *ex facie* of a bill or note to have sole right to it, it will be no defence against action or diligence by him, that

(a) *Fraser v. Bannerman*, 21 June 1853, 15 D. 756.

(b) *Summers v. Marianski*, 16 Dec. 1843, 6 D. 286; *Smith v. Selby*, 10 July 1829, 7 S. 885.

(c) *Antea*, p. 179.

(d) *Antea*, 179, note (f); and *per* Eyre, C. J., in *Walwyn v. St Quintin*, 1796, 1 Bos. and Pull. 658.

(e) *Mayer v. Judis* (N. P.), 1 M. and Rob. 247.

(f) *Russell v. Mather*, 27 Jan. 1822, 2 S. 648. In England, in *Graves v. Key*, 3 B. and Ad. 313, it was held that a receipt on the back of the bill might be explained or contradicted by parole evidence, and that evidence proving that the bill had not been paid on the acceptor's account, it was held to be still negotiable. In Scotland, parole evidence would not have been admitted for this purpose.

he appears *aliunde* to have given only partial value for it (a). This, if proved by his writ or oath, may subject him to exceptions pleadable against his indorser. But, to warrant action and diligence by him, it is enough that he is *in titulo* of the bill or note, and can discharge it; and any transaction, proved by extrinsic evidence, between him and another party, is unavailable, as *res inter alios acta* (b). ‘Even when a bill has been reduced in an action between the drawer and acceptor, an indorser who was not proved to have any connection with the reasons which led to the reduction, was held still entitled to maintain an action on it (c). The holder, having the absolute right to the bill, cannot be controlled in the use of diligence upon it, by any of the other parties. If he agree to give the acceptor delay, he may discharge the indorsers; but so long as he does not do that, they cannot direct him what steps of diligence he is to take, or how stringently he is to proceed. When they are not satisfied with his mode of proceeding, their course is to pay the bill, and then take what they consider the proper steps for their own relief (d).’

2. Action or Diligence by Companies and Joint Holders.

It is said that action or diligence might legally proceed in name of a company for any debt due to them (e). But this doctrine cannot be adopted without limitation (f). On the one hand, it has been held, that a society or company, whether constituted for trading purposes or not, if not incorporated by charter, has no right at common law to sue under a general descriptive denomination (g). It is said, that either the whole individuals composing the company must be named, or at least the directors or committee, who by the constitution of the company represent them (h); and this opinion

Action or diligence by a company;

(a) *Aitchison v. Macdonald*, 12 Nov. 1823, 2 S. 478.

(f) 2 Bell, 619.

(b) *Boag v. Fisher*, 17 Jan. 1849, 11 D. 361.

(g) *Lodge of Lanark v. Hamilton*, 11 June 1730, M. 14554; *Crawford v. Mitchell*, 13 June 1761, and *Wilson v. Jobson*, 13 Dec. 1771, M. 14555; *Culcreuch Cotton Company v. Mathie*, 27 Nov. 1822, 2 S. 47; *Wilson v. Kippen*, 7 June 1823, 2 S. 378.

(c) *Low v. Duncan*, 12 June 1827, 2 W. S. Ap. 583.

(d) *Kerr v. Barbour*, 30 May 1837, 16 S. 1041.

(e) 2 Bell, 619.

(h) 2 Bell, 629.

has been supported by the decisions pronounced in several cases where the instance of a company suing or raising diligence under a descriptive name has been sustained, when the company was joined to individuals, suing or using diligence as partners or managers, where it has been held competent to sue or use diligence against them (a). But it has been decided, that an unchartered company assuming a general descriptive appellation merely as that by which they wish to be known, cannot sue under it (b). On the other hand, it has been held, that bills or notes granted by (c) or to individuals, though described as the office-bearers of an unincorporated society, are valid, as obligations by or titles to the individuals.

If a firm is that under which the company has been in the habit of signing obligations and transacting all their business, it will appear that they are also entitled to sue or use diligence, and are liable to action or diligence under it. Each individual partner is bound by an obligation subscribed under that firm, because each partner is held to have given to every other partner a mandate to bind him by subscribing it; and the firm is held to represent the names of the individual partners, as much as if every name had been specially subscribed. Accordingly, where a house abroad drew a bill on a house in this country, which was dishonoured by the drawees, being partners of the foreign house, were found liable on that character to summary diligence, as drawers (e). But, if a name is known to the public as that used in obligations contracted by the company, and therefore forms a ground of action or diligence against

(a) To this effect were the cases of the *Sea Insurance Company*, 17 Feb. 1827, 5 S. 525, affirmed on the merits, 18 Feb. 1830, 4 W. S. 17; and *Commercial Banking Company*, 28 July 1828, 3 W. S. 365, in both of which cases the company were defenders; and *Fisher v. Syme*, 7 Dec. 1827, 6 S. 216, and *Cheyne v. Little*, 2 Dec. 1828, 7 S. 110, where they were chargers or pursuers.

(b) This was decided in the case of the "*Culcreuch Cotton Company*," p. 413, note (g), as to an action brought by them under that name. The same doctrine was adopted by the House of Lords, though under the modification

already stated in the case of the *Commercial Banking Company*, note (a).

(c) *Ross v. Young*, 14 Jan. 1832, 5 S. 275.

(d) *Leslie v. Sproat*, 24 Jan. 1832, 7 S. 312. A suspension, however, on a charge on a promissory-note to James Dore for the Fleshers of Canons was passed on caution, upon an objection to his title, in respect that the body was not a legal corporation. *Trotter v. Dore*, 3 Dec. 1833, 12 161.

(e) *Thomson v. Liddel and Co*, July 1812, F. C. See also *Wallace v. Plock*, 19 June 1841, 3 D. 1047.

company or its partners, the company must also have the benefit of public knowledge, by being entitled to sue for debts under the firm, since those who contract obligations to them must be presumed to know the firm as well as those who take obligations from it.

This distinction, accordingly, appears to have been recognized in a case already cited (*a*), and was established in a case (*b*), the effect of holding, that a trading company may sue or use diligence, and is liable to action or diligence under the firm by which it subscribes bonds or bills (*c*), and contract other obligations, without a specification of their individual partners.

The subscription of a bill by the firm of a company authorizes diligence *against* the individual partners, so it appears competent to sue *in name* of the individual partners on a bill payable to the firm; provided the fact of their being partners is not disputed, as the firm is, in that case, intended to represent as much as if their names were inserted in it. But, if partnership is denied, either when diligence or action is raised *in* their name or against them, it must be proved by the party alleging it; and in the latter case (*d*), the person against whom diligence is raised will be entitled to have a suspension of it passed without notice.

by individual
partners;

This was probably in consequence of the number of questions which had been raised in Scotland regarding the title of companies to sue or be sued under their social firm, that the Legislature (after

by joint-stock
companies.

Culcreuch Cotton Company v. The Bank of Scotland, *antea*, p. 413, note (*g*), where it had to be held, “that there was a clear distinction between the case where a mercantile company sued under its proper firm, by which it contracted obligations (as Douglas, Heron, & Co., or the like); and where it sued under a mere descriptive name or denomination, as in the present

case of action or diligence raised by a company. This case was very deliberately and fully canvassed in consequence of an opposite judgment which had been pronounced before in the case of *John Aitchison and Co.*, 4 Feb. 1832, 10 S. 396, but which must now be held as overruled. The opinions of the judges give a full history of the law and practice on the subject, and of the course of decisions with regard to it.

Forsyth v. Hare, 18 Nov. 1834, 12 S. 2. In this case the opinions of the House of Lords were expressed to the effect stated in the text. It was the question whether diligence against a company was competent. But the opinions expressed were also quite explicit as to the oppo-

(*c*) As to the signatures which are sufficient to bind the firm, see *antea*, p. 164.

(*d*) *Anderson v. Bolton*, 26 Jan. 1810, 10 F. C.; and *Carlier v. Davidson*, 30 June 1810, there cited.

7 Geo. IV. c.
67.

a temporary statute to the same effect, 6 Geo. IV. c. 131, which expired) and by 7 Geo. IV. c. 67, for the benefit of societies carrying on business of banking in Scotland by joint stocks, the shares of which were transferable, that it should be "lawful for every such joint-stock society or copartnership, already established, or that hereafter be established in Scotland for the purposes of banking to sue and be sued in the name of the manager, cashier, or other principal officer of such society or copartnership, provided that such joint-stock society or copartnership" observed the regulations then prescribed. It has been decided, under this statute, that a bank which subsists only to the effect of winding up its business, is entitled to raise and prosecute diligence or action in name of its cashier (a).

25 & 26 V.
c. 89.

'After the passing of the Act just mentioned, several other Acts were passed at various times for regulating joint-stock companies and the mode in which they were to sue and be sued. These Acts have all been repealed, except as to companies previously registered under them, by the Companies Act of 1862; and it is needless to recite their provisions here, as they would not be useful except to a limited number, and would not save even these the labour of referring to the statutes themselves. Under the Companies Act of 1862 (b), every duly registered company forms a corporation, and therefore may sue and be sued under its corporate name. Any summons or proceeding requiring to be signed by the company may be signed by any director, secretary, or other authorized officer, and need not be under the company seal; and any summons or other document requiring to be served upon the company, may be served by leaving it, or sending it by post, prepaid, addressed to the company, at their registered office (c). The mode in which such companies draw and sign bills has already been explained (d).'

By joint
holders.

It has been decided in England (and seems to be law also in Scotland), that when a bill is payable to a firm consisting of two names, both names must be joined in an action for payment, since the contract has been made with both (e). Nor is it enough that

(a) *Cheyne v. Walker*, 26 Nov. 1828, 7 S. 60; *Drummond v. Holliday*, 18 Jan. 1831, 9 S. 284.

(b) 25 & 26 Vict. c. 89, § 18.

(c) 25 & 26 Vict. c. 89, §§ 62, 64.

(d) *Antea*, p. 143.

(e) *Guidon v. Robson*, 2 Camp. 312, per Lord Ellenborough; *antea*, p. 156.

one of them has no interest, unless he has renounced his interest to the other *ex facie* of the bill ; for otherwise the debtor cannot be discharged without him.

3. *Action or Diligence by Persons having a Derived Title.*

When a person who has been in right to a bill, whether as payee or indorsee, pays its amount to a posterior indorsee, and his payment is acknowledged by a receipt, he has a claim of relief against all the previous parties. In one case (*a*), where the drawer and indorser of one bill, payable to the drawer, and the indorser of another, had paid the amount of the former bill to a later indorser, and taken a receipt on the protest (the indorsation subsequent to his being scored), and had also paid the amount of the latter bill, on a receipt upon the protest, to a party who had previously paid it for the honour of an indorser, the Court, on an application, allowed the protests to be recorded, and summary diligence to proceed in his name, although they had been taken in name of other parties. This decision was probably founded on the Acts 1681 and 1696, which allow diligence by the payee, "or his order," in whatever name the protest is taken. Any person, therefore, who has been once in right to the bill, may use diligence on it as the payee's order, though he has afterwards indorsed it away, provided it appears, by a receipt to him for its amount or otherwise, that he has again acquired right to it.

Diligence by indorsee holding protest and receipt.

'The same right of summary diligence also belongs to the payees of promissory-notes, since the 12 Geo. III. c. 72, allows the same diligence, in all respects, on such notes, as was previously competent on bills (*b*). Under the old forms of diligence, when the extract registered protest did not contain a charge, it was competent for an indorser who might pay the amount to the indorsee after the protest had been registered, thereafter to register the receipt for his payment, and then to obtain letters of horning in his own name (*c*). It is doubtful whether the principle of this decision could be applied to the modern practice (*d*).'

(*a*) *Herries*, 5 Jan. 1745, M. 1509.

(*c*) *Scott v. Stewart*, 11 June 1816,

(*b*) *Kennedy v. M^r Whirter*, 26 June 1849, 11 D. 1198.

H. 75.

(*d*) *Menzies on Conveyancing*, 3d edit. p. 378.

By person
paying *supra*
protest.

It is said to have been decided in one case (*a*), that a bill having passed through the hands of several indorsees, and being paid by a person *supra* protest, for the honour of the second indorser, without an indorsation of the bill or assignation of the protest to this indorser, the protest might, notwithstanding, be registered at the indorser's instance, with a view to diligence. This decision appears to be conformable with the 12 Geo. III. c. 72, now quoted, though that statute was not then passed.

Diligence by
assignee.

It does not appear, that a mere assignation to a bill or note, which has been protested in name of the cedent, would authorize summary diligence in name of the assignee. But if the assignation included the protest, it would probably give the assignee the cedent's right to follow it out by ulterior measures. At all events, the protest, when registered in name of any of the parties described by the statutes, is assignable to any person, to the effect of authorizing diligence in the assignee's name; for it thus acquires, by the Act 1681, the assignable quality of a decree of registration (*b*). A party may also reacquire a bill or note, or claim thereon, by retrocession (*c*). It has been decided, that after horning on a bill had been denounced and registered, an assignation of it gave the assignee a right to have letters of caption issued in his name (*d*). It is probable that marriage, being a legal assignation, would give the husband right to a protest previously recorded, or to diligence raised in the wife's name (*e*). An executor also gets right by confirmation to a protest registered, or diligence raised in his author's name (*f*). But a messenger cannot execute, in name of an assignee or executor, diligence issued in name of his author, because he has no judicial authority to take cognisance of the assignation (*g*) or confirmation. It has been decided, that a party to a bill, who, on being obliged to pay it to the holder, got an assigna-

(*a*) *Crawford*, 13 Jan. 1736; *Elchies*, Nos. 9 and 10, v. Bill, quoted with approval by Lord Medwyn in *Kennedy v. M'Whirter*, 417, note (*b*).

(*b*) *Antea*, 178, note (*f*).

(*c*) This is implied in *Banks v. M'Leish*, 12 Feb. 1830, 8 S. 515, though the circumstances of the case are very special.

(*d*) *Young v. Buchanan*, 24 Jan.

1799, M. 8187. *Vide also* 2 Bell, 20.

(*e*) *Antea*, p. 141.

(*f*) *Antea*, p. 146.

(*g*) This principle was followed in *Hay v. Stewart*, 11 July 1745, *Elchies*, No. 6, v. Assignation, where an arrestment was found null which had been executed in name of an assignee on a horning issued in name of the cedent;

tion to a caption raised in the holder's name, could not sue the messenger for alleged misconduct in executing the diligence before the assignation, as the cedent, who was dead, had not complained of it during his life, the right to complain of such misconduct being held not to be transferred by the assignation (a).

Diligence has been sustained in name of the payee of a note against the granter, for behoof of a cautioner who had paid it (b). By cautioner.

When the drawer of a bill *payable to a third party* is obliged to pay it on the drawee's refusal to accept, he can have no claim against the drawee on the bill, whatever may be his claim on previous transactions. But if the drawee has accepted, he will be liable in recourse to the drawer; because the acceptance affords a resumption of value in the drawee's hands belonging to the drawer, which cannot, in general, be redargued but by his writ or oath. His claim by the drawer against the acceptor is recognised in England (c), and results from the nature of bills. It does not appear, from any of the Acts already cited, to be the foundation of summary diligence, although a contrary notion has been sometimes allowed in practice. Even the Act 1681, c. 20, is limited to the payee or order, which cannot be considered as the situation of the drawer, unless he was also payee. His claim of relief, therefore, could be pursued by action. As to the evidence of payment by the drawer, necessary to warrant an action, there does not seem to be any precise rule. A receipt to him on the bill would be the best evidence, but a separate receipt would also be sufficient. As he is not in this case payee of the bill, and consequently never had right to it, the scoring of indorsations could have no effect in his favour, since that only re-invests a party who had a right before the indorsations, as payee or prior indorsee. Nor would a receipt to the

Diligence by
drawer for
relief against
acceptor.

(a) *Foggo v. Scott*, 7 Dec. 1769, M. 3693, where a poinding executed, under the like circumstances, in name of an assignee, was found null; and in *Kyle v. Thomson*, 12 June 1813, F. C., where the same decision was given regarding a poinding in name of the assignee, on a horning issued in name of the cedent.

(a) *Steel v. Grant*, 9 June 1814, F. C.

(b) *M'Kechnie v. M'Farlane*, 13 Dec. 1831, 10 S. 126.

(c) *Simmonds v. Parminter*, 1 Wills. 185, where such an action by the drawer against the acceptor of a bill, which the former had been obliged to pay in consequence of the latter's failure, was sustained, after full argument, first by the Court of King's Bench, and afterwards, upon writ of error, by the House of Lords.

not to an indorsee, to the effect of missing & relief against the acceptor. But there does not reason why he may not take and use it, like any purpose not inconsistent with the character *ex facie* of the bill, and consequently for his acceptor.

Action or diligence on bills indorsed after action begun;

It has been decided in England, that if the holder, after bringing an action upon it, pays it away with notice to him of the action, the action may be raised by the original pursuer, and the new holder will be raising another action. It was held, that in such case the holder must be presumed to have consented to the original action (*a*). In Scotland, the indorsee of a note would be held to carry with it the right of action; the original pursuer would not be entitled, after the commencement of the action, to continue the action in his own name. Indeed, it would be a defence against him, that he was no longer in right or enabled to discharge it, or give it up. But the indorsee is not entitled to bring a new action, while the other is exhausted: he must assist himself in the first action, and if that view should obtain an assignation to it, which the pursuer is to give.

or after summary diligence begun.

When a bill or note is indorsed after summary diligence has been raised on it, there should be also an assignation to the indorsee (*b*). It has indeed been held that a party acquiring a bill, before the term of payment has been refused, but which bears no mark of protest, is entitled to sue for payment. But it is

the bill, and could not, therefore, be *in bona fide* to take a second protest. Hence he is bound to procure diligence on the original protest, or, if diligence has been already raised, which he must ascertain, seeing that, in the case of a dishonoured bill or note, he is liable to all the objections pleadable against his author, he can obtain an assignation to it, or, on obtaining an assignation to the protest, may probably raise new diligence on it in his own name. When a party originally in right to a bill or note reacquires it on payment, by virtue of a receipt or otherwise, these documents, which instruct his title, are registered with the protest, to afford warrant for diligence at his instance. But if the protest is registered before he reacquires the bill or note, it being a decree authorizing diligence only by the party in whose name it is registered, the diligence cannot proceed in name of the new holder, unless he produces an assignation to the protest as a warrant for it.

SECTION II.

PROCEDURE BY ACTION OR DILIGENCE ON BILLS OR NOTES.

1. *Ordinary Action.*

As to the procedure by action on bills or notes, there is no essential difference, in the form of the summons or otherwise, between the procedure on it, and on any other document of debt. The Judicature Act of 1826 (*a*), establishing a new form of process in Scotland, and requiring, *inter alia*, that, in every action, "the nature, extent, and grounds of the complaint or cause of action shall be set forth in explicit terms" in the summons, and the rules enacted both by that statute and by the consequent Acts of Sederunt, as to the framing of records, introduced greater precision into the form of actions with regard to bills or notes, as well as other claims. The forms thus introduced have since been considerably modified, and the procedure is now regulated, in the Court of Session, by the Act of 1850 (*b*), and in the Sheriff Courts by the Act of 1853 (*c*). It would be out of place in this work to give a digest of the pro-

Procedure in
ordinary ac-
tions.

(*a*) 6 Geo. IV. c. 120. (*b*) 13 & 14 Vict. c. 36. (*c*) 16 & 17 Vict. c. 80.

ceedings in ordinary actions. All that seems requisite is to notice those decisions which are peculiarly applicable to bills.'

How claim on
bills libelled.

'The principal things to be attended to in suing on a bill are, that the title of the pursuer be correctly set forth, and that the bill itself be correctly described. Great accuracy is required in setting out a title. A summons was held bad, where the pursuer described himself as the indorsee of a particular party, but afterwards admitted that there had been an intermediate holder (a); and dealing still more strictly, a summons was dismissed, because the pursuer, who admittedly held the bill at first for behoof of another, failed to set forth how he came to hold the bill for his own behoof (b). When the holder is suing a prior indorser or the drawer, it does not seem absolutely necessary to set forth in the summons that the bill was duly presented to the acceptor, but not paid, and that notice of dishonour was duly given, though it would be imprudent to omit these statements; and they require to appear in the closed record, as they must be proved or admitted before the pursuer can make out his case (c). But if the pursuer sets forth a title which is not merely incomplete, but irrelevant (as by stating that he is the indorsee of a person to whom, however, he re-indorsed), he cannot allege other grounds of action without amending the libel (d). In regard to the description of the bill, the particulars of the date, the acceptors', drawers', and indorsers' names, so far at least as essential to the pursuer's title, and the amount and time of falling due, must be accurately set forth. For example, if the date be erroneously set forth, the summons will be bad (e). If there be anything peculiar in the signatures of any of the parties, as, for example, if any of them be per procuracion, or have been adhibited by another and adopted, that must be set forth (f).'

(a) *Ewing's Trustees v. Farquharson*, 29 Feb. 1829, 7 S. 464.

(b) *Burness v. Goodfellow*, 5 June 1858, 20 D. 1084. Lord Cowan dissented. A contrary decision was given in England in *Law v. Parnell*, 2 Dec. 1859, 29 L. J. (C. P.) 17. The plaintiff sued on a blank indorsed bill. On its appearing at the trial that he had got the bill as agent for a banking company, of which he was manager, it was ruled, notwithstanding, that as he was

suing by their authority, it was not necessary for him to have declared upon an indorsement by them to him.

(c) *Macdonald v. M'Quarrie*, 29 Feb. 1860, 22 D. 922.

(d) *Dickie v. Gutzmer*, 27 Feb. 1828, 6 S. 637.

(e) *Barclay v. Alexander*, 26 Feb. 1846, 8 D. 549.

(f) *Jackson v. Williamson*, 9 Dec. 1825, 4 S. 292; *Muir v. Braidwood*, 30 Nov. 1831, 10 S. 83.

2. *Summary Diligence.*

The statute 1681, c. 20, which is the leading enactment, requires, in order to summary diligence for non-acceptance or non-payment, that the bill or note shall have been duly protested before expiration of the three days of grace. This provision must apply, in case of acceptance and non-payment, only to acceptors, because none but acceptors were made liable by the Act, in that case, to summary diligence. The same thing is required, as an ingredient of a regular protest in inland bills and promissory-notes, by 12 Geo. III. c. 72, which also assumes that the same rule is enforced with regard to foreign bills; and, indeed, the Act 1681, c. 20, which relates to foreign bills, allows summary diligence only in the case of bills "*duly protested* for not-acceptance or for not-payment" (a). Accordingly (b), where a bill had not been so protested, the Court refused summary execution against the drawer or indorsers, although there was reason to believe that the parties had agreed to dispense with strict negotiation, this being held to afford ground only for an ordinary action. In case of non-acceptance, the protest ought to be taken for non-acceptance against the drawer and indorsers; and the instrument of protest should bear this, to warrant diligence against them. A decision to the contrary, which has been already mentioned, appears to be questionable (c). It is said to have been decided in another case (d), that a protest for non-payment against the drawer and all others concerned, without naming the acceptor, afforded a warrant for execution against him. But in such a case, the instrument of protest ought, at least, to *imply* that a protest was taken against the acceptor.

From what has been already said (e), it appears that it is not necessary to extend an instrument of protest immediately, whether for non-acceptance or non-payment, in order to preserve recourse against

Protest.

Extending
protest.

(a) It may here be pointed out, that when summary diligence is competent, damages for the oppressive use of it cannot be recovered, unless malice is alleged and proved. *Gardner v. Martin*, 10 June 1864, 2 Macph. 1183.

(b) *Elliot v. Richmond*, 5 Aug. 1775, M. 1602.

(c) *Yuill v. Richardson*, 25 July 1699, Forbes, 134.

(d) *Inglis v. Mackay*, 1697, Forbes, 139.

(e) *Antea*, p. 312.

the drawer and indorsers of a bill or note, but that it is sufficient if the extended instrument be produced when action or diligence is raised. A copy of the bill or note must be prefixed to the instrument.

Protest by one person, extended for another.

It has been decided (*a*), that after a protest on a bill was taken in name of the bank that discounted it, the instrument of protest might be extended and registered in name of a different party, who had in the meantime onerously acquired the bill. But the soundness of this decision may be questioned; for if the protest was taken at the instance of one party, it does not appear correct to represent it in the instrument, as in this case, to have been taken at the instance of another party. The party acquiring the bill after the protest might, as has been already shown (*b*), have obtained diligence in his own name, though the protest was extended in name of another; and if it was so registered, he might still have got right to it by assignation. The question now stated was since raised in another case (*c*). But the Court held that it came too late, as there had been previously a deposition on a reference as to the onerosity of the bill. 'In a later case the question was again raised, and different opinions were expressed on the Bench in regard to it (*d*).'

Registration of protest.

Place.

To obtain summary execution, the extended instrument of protest must be registered, in the books of the Court of Session, or of any court competent to try an action for payment of the bill or note. It has been decided (*e*), that a protest recorded against the drawer, not in the books of the jurisdiction in which he resided, but in those of the jurisdiction where the bill was payable, could not form the ground of summary diligence against him, and that the charge given could not be turned into a libel after the record was closed. 'But it is sufficient if the protest be recorded in the books of a court having jurisdiction over the particular party against whom diligence is being used, though that court may have no jurisdiction over the other parties to the bill, or even over the firm, in virtue of whose signature the party charged has become liable (*f*).' The

(*a*) *Mackie v. Hilliard*, 15 June 1822, 1 S. 499, H. 281.

(*b*) *Antea*, p. 417.

(*c*) *Allan v. Galli*, 5 June 1829, 7 S. 706.

(*d*) *Swanston v. Archibald*, 23 Nov. 1837, 16 S. 308. Further information

in regard to the protest will be obtained *antea*, Chapter vi. sect. 2, where it will be found treated at length.

(*e*) *Campbell v. Macdonnel*, 22 Feb. 1827, 5 S. 412.

(*f*) *Sutherland v. Gunn*, 17 Jan. 1854, 16 D. 339; cited also *antea*, p. 160.

registration, as a ground of diligence for non-acceptance, must take place within six months after the date of the bill or note; or for non-payment, within the same time after it falls due (*a*). This last period must run from the last day of grace, in all bills or notes on which days of grace are allowed, since it is only then that they fall due.

It would appear that the simple possession of a bill or note is sufficient, without an express mandate from the creditor, to authorize the taking and recording of a protest, or the issuing of letters of horning on it. This seems to be the law, when the creditor is out of Scotland, though in that case an action could not be brought without a mandate. But the rule is different as to diligence. 1st, Both taking a protest and recording the instrument of protest are purely ministerial acts, which require no judicial permission to authorize them, and the performance of which cannot be prevented by the debtor on any ground. 2dly, When the protest has been recorded, the extract of it, which cannot be refused by the proper officer, is equivalent to a decree. A mandate is required from the pursuer of an action, that there may be a person in this country responsible for expenses of process. But here there is no process. Accordingly, in two cases, where diligence on a bill at the instance of a party residing abroad was objected to, on the ground that no mandatory's name had been inserted, the objection was repelled (*b*). 'And in a late case, the point was again fully considered, owing to there having been some difference in practice; and it was held that it was competent, at the instance of a foreigner, to protest a bill of exchange, to register the protest, and charge the debtor on the extract, without a mandatory having been sisted; but the distinction was taken, that if a litigation ensued, the foreigner would be bound, if called on, to sist a mandatory (*c*).' In a case (*d*), where the trustee in a sequestration had first given the agent in the sequestration one bill to do diligence on it, and afterwards, on taking another bill for the same debt at a longer term, sent him it, though without express instructions to do diligence on it,

Time.
Who may
record and do
diligence.

Must a
foreigner sist a
mandatory?

Agent.

(*a*) *Antea*, p. 403.

(*c*) *Ross v. Shaw*, 8 Mar. 1849, 11

(*b*) *M'Kie v. Hilliard*, 14 Nov. 1820,
and 14 June 1822, 1 S. 499, H. 281;
Stiven and Greig v. Bird, 27 June 1822,
First Division, N. R.

D. 984.

(*d*) *M'Donald v. Kelly*, 5 July
1821, 1 S. 101, Session papers.

the agent was notwithstanding held, under the circumstances, to have an implied authority to do diligence on it when it fell due; and therefore, as the trustee had neglected to inform the agent of some partial payments, in consequence of which a charge given by him for the full sum was suspended, with expenses, he was found entitled to reimbursement of those expenses from the trustee. But an agent is not authorized, by mere possession, to raise action or diligence on a bill marked "Paid," because it is presumed, from such marking, to have been retired by the proper debtor (*a*).

Effect of
Registration.

The registration of the instrument of protest has the effect of a decree by a competent court for payment of the bill or note. Bonds generally contain a clause stipulating that they shall be registered for execution in the books of some competent court; and being registered by virtue of this clause, an extract of them is held equivalent to a decree, and, without further procedure, affords ground for immediately issuing letters of horning, of which the effect shall be afterwards explained. The Acts already quoted with regard to bills and notes, provide that the recording of an instrument of protest on them shall afford ground for interponing the authority of the judge thereto, to the effect that diligence may proceed thereupon, "in the same manner as upon registrat bonds, or decrees of registration proceeding upon consent of parties."

Extract regis-
tered protest
contains war-
rant to charge.

The extract of the instrument of protest, being equivalent to the decree of a competent court for payment of the bill or note, affords warrant for letters of horning, which are precepts issued in name of the Sovereign, commanding that the debtor be charged to make payment of the debt. ' But this mode of proceeding, by letters of horning, though still competent, is now unused, as a simpler and cheaper means of proceeding has been provided by the Personal Diligence Act of 1838. Under that Act, the person issuing the extract of the registered protest is bound to insert in it a warrant to charge the debtor to pay the debt within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind, and for that purpose to open shut and lockfast places. This warrant authorizes the messenger-at-arms, or sheriff-officer, to proceed to carry out all the various steps of diligence in the forms provided by the statute; and diligence executed in this way has the same

(*a*) *Jackson v. Williamson*, 9 Dec. 1825, 4 S. 292.

effect as if it had been executed under the forms previously in use (a).'

It has been held, as to an extract protest, bearing date 20th December, that an erasure in the figures 20 is no ground of nullity, the protest being a warrant for summary diligence, if recorded on any day of the month of December (b). 'But an erasure *in essentialibus*, as in the day of month on which the bill is payable, is fatal to the diligence (c).'

Erasure
in extract.

The charge is executed, in ordinary cases, on *induciæ* of fifteen days; but in bills or notes, six days only are allowed (d). Such a charge is a preliminary step towards execution for payment of the debt, or, in the words of the Act of 1681, that "executorials necessary" may pass thereupon. 'The charge must conform strictly to its warrant; and the nature and date of this must be accurately set forth (e). So necessary is accuracy in matters of diligence, that it has been considered a question for serious doubt, whether a charge was good which set forth that it proceeded upon "an extract registered protested note or bill of exchange," in place of upon the extract registered protest (f). The charge must next specify the name and designation of the creditor at whose instance it is given (g); and it can be given only for the parties in whose favour the warrant runs. Thus, where a warrant to charge was in favour of a firm, and its partners *nominatim*, a charge given at the instance of the partners alone was held bad (h). In the next place, the charge can, with but one exception, be given only against the parties named in the warrant. The exception is the case of diligence against a company, where, as already pointed out, the officer may charge any of the partners *nominatim* on a warrant against the

Charge.

(a) 1 & 2 Vict. c. 114.

(b) *Crichton v. Watt*, 25 Nov. 1830, 9 S. 68.

(c) *Brown v. Blaikie*, 1 Feb. 1849, 11 D. 485.

(d) 1681, c. 20.

(e) 1 & 2 Vict. c. 114, sch. 2.

(f) *Glen v. Black*, 19 Nov. 1841, 4 D. 36. For a case where the narrative of the warrant, though questioned, was held sufficient, see *Sutherland v. Gunn*, p. 424, note (f).

(g) In *Henderson v. Smith*, 28 Feb. 1852, 14 D. 583, it was held that this requisition was sufficiently complied with in a charge, which narrated that it was given at the instance of "Donald Smith, manager and for behoof of the Western Bank," though neither the residence nor place of business of the charger was mentioned.

(h) *Craig v. Brock*, 23 Nov. 1841, 4 D. 54.

firm (*a*). In the last place, the charge must be executed either personally, or at the principal dwelling-place of the debtor (*b*).'

Poinding,
imprisonment,
etc.

If the debtor does not pay when the days of charge expire, he may be apprehended and imprisoned. 'If anything has been paid to account after the execution of the charge, the warrant to imprison must be only for non-payment of the sum still remaining due (*c*).' The debtor's moveables may likewise be attached or poinded for payment of the debt under a warrant to that effect. The effects being thus attached, may be afterwards sold for payment of the debt, under a warrant of sale. The creditor may likewise arrest all debts due by third parties to his debtor (*d*). A registered protest for non-payment was found, before the 12 Geo. III. c. 72, not to be a sufficient warrant for arresting the drawer's effects without a depending action (*e*). But the 12 Geo. III. c. 72, makes summary diligence of all kinds competent on non-payment, as well as non-acceptance, against the drawers and indorsers of bills and notes as well as the acceptors of bills.

Messenger.

It has been held illegal in the indorsee of a bill to give a charge on it as messenger, against the acceptor, for his own behoof, and that of other indorsers (*f*).

Additional
remedies.

The debts arrested may be afterwards transferred to the creditor, in payment of his debt, by a process of forthcoming. The creditor may also bring a process of adjudication, as soon as the debt becomes due, to attach the debtor's heritable property. The debtor may be prevented from disposing of his heritable property to the creditor's prejudice by letters of inhibition, which may be issued either on the bill or on the registered protest, in security, even before the term of payment, if he is *vergens ad inopiam*. It has been decided on a hearing before the whole Court (*g*), that the

(*a*) *Antea*, p. 160. In *Knox v. Martin*, 12 Nov. 1847, 10 D. 50, a warrant against a firm, and a named partner, was held to authorize a charge against another partner who was not named.

(*b*) 1540, c. 75. In *Ballinten v. Connon*, 20 Nov. 1852, 15 D. 35, a charge, left for a seaman at his father's house in Aberdeen, was sustained, because he had no fixed residence, had accepted the bill payable in Aberdeen,

and resided with his father when there.

(*c*) *Wilson v. Stronach*, 9 Jan. 1862, 24 D. 271.

(*d*) *Weir v. Falconer*, 2 Feb. 1814, F. C.

(*e*) *Richardson v. Fenwick*, 3 Mar. 1772, M. 678.

(*f*) *Dalgleish v. Scott*, 18 June 1822, 1 S. 506.

(*g*) *Thom v. Black*, 10 Dec. 1828, 7 S. 158.

payee of a bill, who had indorsed it away, might, before the term of payment, competently arrest the acceptor as *in meditatione fugæ*, till he found security to pay the bill, or to abide the raising of diligence against him for payment of it.

These are the principal kinds of execution against the debtor's person and property, for which the registration of the protest affords a warrant. The details of procedure applicable to each need not be here given, since a full account of them, considered as the means for enforcing payment of every kind of debt, is contained in all elementary treatises.

3. *Diligence on Bank-notes.*

Summary diligence on bank-notes and bankers' notes would probably have been competent under the general enactments of the 12 Geo. III. c. 72, had it not been specially regulated, before that Act was passed, by the 5 Geo. III. c. 49, § 4, 5, 6. That statute enacts, 1st, That, in the case of all "notes, accepted bills, post-bills, tickets, tokens, or other writings for money of the nature of a bankers' note, circulated or to be circulated as *specie*," summary diligence, by recording the protest, and other steps already detailed with regard to bills, shall proceed at the holder's instance against the individuals or bodies politic or corporate "liable in payment of the same," or their representatives, "not only for the sum or sums therein contained, but also for the interest thereof from the time of demanding payment;" 2^{dly}, That a protest, taken "at the office of the person or persons, bodies politic or corporate, liable in payment of the same, between the hours of nine in the morning and three in the afternoon, for not-payment, or for not marking" of such documents, shall be registrable with a view to summary diligence, at the time and in the manner already explained in the case of bills; 3^{dly}, That, instead of taking a separate protest on each note or other such document, when diligence is required on several notes of the same tenor, it shall be sufficient to prefix to the protest the contents of one of them, and "subjoin thereto the dates and numbers of all other notes and writings aforesaid, of the same tenor and contents, whereof he or she shall then demand payment;" And, 4^{thly}, That no suspension or sist of a charge or other execution on such documents shall pass, but on a discharge from the holder, or on an offer,

“made to him or her, in the form of an instrument duly signed by a notary-public and two witnesses,” to pay the full amount of the note or other such document, with the expenses of protest, registration, and other diligence, to be certified by an account under the holder’s hand; reserving, however, to the debtor his action of repetition for any overcharge in such account, and to the holder his claim of damages for undue delay of payment. This enactment is still in force. But it does not seem to warrant diligence against an indorser of such notes, which therefore, if it occur, must be regulated by the 12 Geo. III. c. 72.

SECTION III.

CLAIMS AGAINST THE SEVERAL PARTIES TO BILLS OR NOTES, RECOVERABLE BY ACTION OR DILIGENCE.

1. *Claims against the several Parties.*

Claim against
acceptors,
drawers, and
indorsers.

At common law, the person in right to a bill or note has a claim first against the granter or acceptor (but not against the drawee not accepting, though there may be a separate claim, if he was bound to accept); and, failing payment by these parties, then against all or any one of the previous parties for the full amount of the bill or note. The primary claim for payment against the acceptor applies as much to an acceptor for honour as to the drawee, since the former has, as to the holder of the bill, placed himself in the situation of primary debtor. It has been settled, both as to foreign and inland bills, that there is a direct claim against every indorser, without previously claiming against the drawer or prior indorsers, each indorser being considered as a new drawer (*a*). This claim, as already explained (*b*), is equally competent to the creditor in the bill or note, or to any party who has been obliged to pay it, against the parties prior to him. But neither the drawee of a bill nor maker of a note can sue any of the other parties on it, since he is the proper debtor. Accordingly, it has been held (*c*), that the bail

(*a*) *Antea*, p. 417.

(*b*) *Ibid*.

(*c*) *Hull v. Pitfield*, 1 Wilson, 46.

In this case, the indorsee of the note,

after getting payment of it from the maker’s bail, had allowed the latter to sue the indorser in his name. But the Court of Common Pleas held such

of the maker of a note, after paying it, could have no recourse against an indorser. A person who has accepted a bill or granted a note for the accommodation of another, may have an action of indemnity against the latter, but not on the bill or note (*a*). It has been already shown (*b*), that no person can be liable on a bill or note, unless his name, or that of some party who represents him, be on it. If a person delivers a bill or note, without indorsing it, in payment of a preceding debt, he will be liable, in case of its non-payment, not on the document itself, but for the preceding debt (*c*).

When the holder of a bill or note makes the acceptor or granter his executor, it has been said, that, unless the latter renounces, the debt will be extinguished, not only as to him, but as to all the other parties, since their obligation is merely subsidiary to his (*d*). Executors.

When several parties are bound together for a bill or note, whether in the same character, for instance, as joint drawers, acceptors, or indorsers, or in different characters, viz. one as drawer and another as acceptor, the person in right to the bill or note is entitled, on non-payment, to sue them all at the same time, and take execution against them all till he recovers full payment. In a case prior to 12 Geo. III. c. 72 (*e*), warrant was granted for summary diligence at the instance of the holder of a bill against the drawer and whole indorsers, without previously discussing the drawer, the Court holding that they were all to be considered as drawers. This must have been an unaccepted bill. But by 12 Geo. III. c. 72, summary diligence is also authorized against all the parties to a bill at the same time, in case the bill is accepted but not paid. Payment by one of them will extinguish a bill or note as to all the rest (*f*), so far as the holder is concerned. All parties may be sued at once;

The party paying may insist for an assignation to the debt and diligence, that he may operate his relief against the other parties. For instance, one of two joint acceptors, on being sued for payment, And party paying has right to relief.

a claim to be incompetent, the bill being extinguished.

(*a*) *Young v. Hockley*, 3 Wils. 346.

(*b*) *Antea*, p. 29. (*c*) *Antea*, p. 93.

(*d*) Pothier, Nos. 190–1. This was also decided in *Freakley v. Fox*, 2 B. and Cr. 130. See further, as to executors, *antea*, p. 145.

(*e*) *A. v. B.*, 26 Feb. 1747, M. 1510.

(*f*) In *Windham v. Withers*, and *Ditto v. Trull*, 1 Str. 515, the holder of a promissory-note having obtained judgment in actions both against the drawer and the indorser, and a tender having been made to him of the principal sum in one of the actions, and the costs in both, an order was given to stay execution.

may insist on previously getting an assignation to any debt of diligence obtained against his co-acceptor, that he may thereby effectually operate his relief (a). When the holder, after getting payment from one of two acceptors, allows diligence which has begun still to go on in his name for behoof of that acceptor against the other acceptor (this being avowed, so as to admit any possible compensation against him), such a proceeding is held competent. It has been decided (c), that the holder is bound to accept a bill of payment with expenses made by a third party, and to give thereupon an assignation to the debt and diligence, but without recourse on him; and his refusal was held to be a good ground for suspending a charge given by him to one of the acceptors. In another case, it is said to have been decided by the First Division of the Court, on a verbal report by the Lord Ordinary on the 5th of May 1822, that the holder of a bill payable to the drawer, and indorsed by the latter to him, was bound, on getting payment from the acceptor, to give him an assignation, without recourse, of his own claim against the drawer (d). But, in a later case (e), it was held, that the indorsee, who had paid, as was said, for the drawer's behoof, and afterwards got payment from a party who was liable, under a bill of presentation for the acceptor, on a letter by his agent, engaged to grant an assignation to the debt and diligence, was not liable to grant such an assignation as against the drawer. Where a party had indorsed a bill (as was said), for the drawer's accommodation, which was discounted with a bank, and dishonoured, and another party, brother-in-law of the drawer, whose name was not on the first bill, put his name on a second bill for the same sum, as indorser, prior to the indorser of the first bill, and the proceeds of it were applied in extinction of the first bill, he was found entitled, on retirement of the second bill, under an assignation from the bank to the debt and diligence on the first bill, to enforce it, for his relief against the indorser, though the latter was posterior to him on the second bill (f). But, as he seems, by indorsing the second bill, he is

(a) *Ersine v. Manderson*, 14 Jan. 1780, M. 1386.

(b) *Walker and Johnstone v. Sir W. Forbes & Co.*, 29 May 1829, 7 S. 684.

(c) *Rainie v. Milne*, 1 S. 377.

(d) *Lee v. Wallace*, 1822, N. R.

(e) *Cameron v. Robertson*, 2 Feb. 1830, 8 S. 430.

(f) *Chalmers v. Taylor*, 20 Nov. 1832, 11 S. 53. *Vide* the opinion of Lord Gillies, which is against the judgment.

this indorser, to have admitted that he had no claim of relief on it against him, it may be doubted whether he could be entitled thus to operate his relief on it indirectly, by an assignation to the diligence on the first bill, which could not make his substantial right better, though it might afford him the legal means of enforcing it. 'Where a bank had executed an assignation of an overdue bill and protest, with a condition that the assignee should not prosecute in their name without their consent, it was held that this was a matter between the assigners and the assignees, and that the indorsers had no right to inquire whether the condition had been complied with (a).'

The creditor, after getting a partial payment from one of the parties, can insist against the others only for the balance. It seems, indeed, to have been decided in England, that, after the holder had got a partial payment from the indorser, he might insist for the full amount against the drawer and acceptor (b). There might be some reason for this judgment, if the indorser made such a payment without marking it on the bill or note; since, by allowing the document to remain unmarked in the indorsee's hands, and thus enabling him to discharge it, he empowers him to receive full payment, reserving his own claim against him for the sum previously paid. In such a case it is *jus tertii* to the drawer or acceptor, whether the whole amount is claimed from them by the holder, or the sum already paid is claimed separately by the indorser for his relief. But if the indorser's payment is marked on the bill or note, the holder is not entitled to discharge, or consequently to exact payment of more than the balance. It has been said, that the contrary rule is necessary to prevent the hardship of separate actions on the same bill or note at the instance of different parties. But the proper action or diligence on the bill or note would still be only one, viz. by the holder for the balance due to him. The claim by the indorser against the previous parties for the sum which he paid, is not properly a claim on the bill or note, but a distinct claim of relief, to

After partial payment, claim only for residue.

(a) *Dick v. Murison*, 13 Nov. 1845, 8 D. 1.

(b) This seems to be the import of the decision in *Johnson v. Kennion*, 1764, 2 Wils. 262 (as recognised and confirmed by Eyre, C. J., in *Walwyn*

v. St Quintin, 1796, 1 Bos. and Pull. 658), and also of *Reid v. Furnival* (Ex. 1833), 1 Cr. and Meas. 539. Vide the opinion of the Court in *Bacon v. Searles*, post. p. 434, note (b).

which none of these parties can object, since they have rendered themselves liable to it by not making payment. That this was the proper nature of such a claim, was lately decided, in an action by the drawer of a bill against the acceptor, for repayment of part of it paid by him to the holder, where the action being brought, not on the bill, but as an action for money paid to the acceptor's use, was held to be properly laid (a). Accordingly, the correctness of the decision, first referred to on this subject, and even the accuracy of the report, have been since much questioned (b). In Scotland, it has been decided (c), that the trustee on an indorser's estate was entitled to sue the acceptors for repetition of certain dividends recovered by the holder out of the indorser's estate, as well as for relief from all future payments, without producing the bill, which the holder had retained, to make good his claim for the balance against the other parties. The ground of decision was the principle now stated, viz. that the action was not brought on the bill, but was an action of repetition and relief founded on the relative situation of the different parties to the bill, in which the bill would have formed merely an article of evidence, if it had not been rendered unnecessary by admission of the facts on which the pursuer's claim was founded.

It has been decided, that the payment of part of a bill by the drawer precludes the holder from suing the acceptor for more than the balance (d). A partial payment by the acceptor undoubtedly precludes the holder from suing either the drawer or indorsers for more than the balance, because these parties are not bound to pay, unless in so far as the acceptor has failed to pay.

2. Sums recoverable on Bills and Notes.

Principal sum.

As to the principal sum in bills or notes, recoverable under them, it is needless to add anything. In the case of a bill or note pay-

(a) *Pownal v. Ferrand* (K. B. 1827), 6 B. and Cr. 439.

(b) *Per Wilson, J., in Bacon v. Searles*, 1788, 1 H. Bl. 90.

(c) *Thomson and Co.'s Trustee v. Craig and Hunter*, 10 Dec. 1818, and 26 Jan. 1819, Sess. papers.

(d) *Thomson and Co.'s Trustee v.*

Craig and Hunter, *ut supra*; *vide also* cases cited p. 433, note (b), and *Pierson v. Dunlop*, 1777, 2 Camp. 575, where the holder of a bill having taken a verdict for its full amount against the acceptor, without deducting a previous payment made by the drawer, was obliged afterwards to deduct it.

able by instalments, but which declares that, if there should be a failure to pay one instalment, the whole shall become due, this condition must receive effect, since it is consistent with the nature of bills and notes to have thus a term of payment of which the arrival is certain, though the time of its arrival may vary with circumstances (*a*). The bill or note seems to have the same effect with reference to the different instalments, as if there were separate documents for each instalment.

The legal claims for interest on bills and notes are regulated in Scotland by statute. The first enactment on the subject is contained in the Act 1681, c. 20, which enacts, "That the sums contained in *all* bills of exchange bear annualrent, in case of not acceptance, from the date thereof, and in case of acceptance and not payment, from the day of their falling due, ay and while the payment thereof." Although this clause mentions *all* bills of exchange, it ought probably to be limited to foreign bills, since these form the subject of the statute. But as the Act 1696, c. 36, not only allows the same summary execution on inland bills as on foreign bills, but declares that the Act 1681 is "extended to inland bills and precepts in all points," the clause in it which relates to interest is thus extended to inland bills. Some doubt was expressed on this subject by Mr Forbes (*b*); but the Court afterwards held (*c*), that the Act 1696 did extend the clause in question, as well as the rest of the Act 1681, to inland bills, and therefore they found the acceptor of an inland bill liable for interest on it from the term of payment. This rule regarding interest was extended to promissory-notes by the 12 Geo. III. c. 72, which enacts that such notes "shall bear interest as bills."

Agreeably to the Act 1681, which is the fundamental Act regarding interest, it is due, on bills not accepted, from their date, and, on accepted bills and notes, from the term of payment. It has been said (*d*), that a protest is necessary to afford ground for a demand of interest. This may be true with the non-acceptance of bills; because, in that case, the claim lies only against the drawer and indorsers, against whom no recourse ('by summary diligence')

Interest.
Protest not
required to
found claim
for interest.

(*a*) *Antea*, p. 44.

(*b*) 132-3.

(*c*) *Blair v. Oliphant*, 8 June 1708, M. 473.

(*d*) Glen, 276, 2d edit.

can be preserved for any claim arising from the bill, without a protest. This rule must also apply as to any claim against these parties for interest on bills accepted, but not paid. But there is no ground for applying it, in the case of such bills, to claims of interest against the acceptor. The principal sum may be claimed from him, though not by summary diligence, without a protest; and a protest seems equally unnecessary to enforce a claim for interest. The contrary, indeed, appears to have been once held (*a*) as to a foreign bill. But, in a later case, relating also to a foreign bill, it was decided (*b*), that the acceptor was liable for interest though there had been no protest. The distinction which has been now stated betwixt the drawer and acceptor, as to the necessity of a protest, was pleaded in this case, and seems to have been adopted by the Court. The same rule applies to a claim of interest against the acceptor of an inland bill, or the granter of a promissory-note. Accordingly, in the case (*c*) of an inland bill which had been accepted, and had lain over for many years without protest, interest was allowed against the acceptor.

When demand
required to
found claim
for interest.

Interest, being due by statute on accepted bills, and on notes from the term of payment, may, when they are payable at a fixed term, be exacted from the acceptor or granter without a previous demand of payment; for the claim of interest here arises at the term of payment (*d*). It has been shown (*e*), indeed, that at common law the acceptor or granter is bound to make payment, at least to the original creditor, without a formal demand. In bills or notes payable a certain time after sight, presentment must be proved to fix the term of payment, from which, in case of acceptance, the interest is to run. The same thing is necessary with bills or notes payable *at sight*. If days of grace are, according to what has been already stated (*f*), allowed on such documents, interest will begin to run on them from the last day of grace. In accepted bills or notes payable on demand, it will run only from the demand, since that is the term of payment. When there is a protest for non-payment, the date of the protest will be held to be the date of the demand.

(*a*) *Watson v. Gordon*, 15 July 1713, M. 475.

(*b*) *Baynton v. Swinton*, 14 Nov. 1718, M. 474.

(*c*) *Tarras v. Innes*, 22 Jan. 1740, M. 476.

(*d*) *Melrose v. Black*, 15 Jan. 1839, 1 D. 358.

(*e*) *Antea*, p. 252 *et seq.*

(*f*) *Antea*, p. 247.

In an action (*a*) on a bill payable on demand, the Court found interest due only from the date of citation. But it does not appear that there was an extrajudicial demand. 'It is now fixed beyond question, that in bills or notes payable on demand, interest is due only from the date of the demand (*b*).'

It has been shown (*c*), that, when the acceptance of a bill is dated, that will be held to be the date of presentment; and consequently, in a bill payable at or after sight, the term of payment, from which interest must run, will depend on the date of acceptance. If the acceptance is not dated, presentment will be held to be 'within a short but reasonable time' of the date of the bill. In two cases of accepted bills, where the drawer, who was also payee, and the acceptor lived in the same place, one of the bills being made payable three days after sight, and the other at sight, the Court, chiefly in respect that the drawer and acceptor lived in the same place, held that the acceptance, which was not dated, must be presumed to be of the date of the bill, and therefore found interest due, in the one case, from its date, and, in the other, from the third day after date, as being respectively the terms of payment (*d*).

Date from
which interest
runs.

The validity of bills or notes stipulating interest from a date prior to the term of payment, has been already considered (*e*). It has been held in England, that a bill or note purporting to be for money lent bears interest from its date (*f*). It has been also held (*g*), that a note containing the words "bearing interest," carries interest from its date, not merely from the term of payment, since it would carry interest from that term at all events. Such a stipulation, however construed, would also make the interest recoverable by summary diligence (*h*).

(*a*) *Moncrieff v. Moncrieff*, 7 Feb. 1752, M. 479, Elchies, No. 52, v. Bill.

(*b*) *Per Curiam, Bon v. Rollo*, 21 Feb. 1846, 12 D. 1310.

(*c*) *Antea*, p. 216.

(*d*) *Tarras v. Innes*, 22 Jan. 1740, M. 475, Elchies, No. 21, v. Bill; *Kinloch v. Mercers*, 22 Nov. 1748, M. 477; Elchies, No. 40, v. Bill. 'These cases do not seem to have been intended to lay down any general principle, but to have been rested on the ground that

it was reasonable to presume, in their circumstances, that the bills were accepted immediately.'

(*e*) *Antea*, 15 *et seq.*

(*f*) *Cotton v. Horsmanden*, Prac. Reg. 357, cited in Bayley, 349, note 39.

(*g*) *Per Lord Ellenborough in Kennerley v. Nash*, 1817, 1 Starkie, 452; also in *Doman v. Dibden*, 1 R. and M. 382.

(*h*) In the first edition, I expressed doubts, whether interest, when not

On bills payable by instalments.

When an accepted bill or note is payable by instalments, interest is only recoverable on each instalment from the time it falls due ; because that is the term of payment applicable to it, unless there is a stipulation that the whole instalments shall become due at once, on failure to pay any one of them ; in which case interest will be recoverable on the whole from the time when the first instalment became due, as being, according to the bill or note, the term of payment in that case for the whole instalments.

Amount of interest.

Interest on bills and notes being exigible in Scotland by statute, and not, as in England, merely as damage for breach of contract, there is no room for an abatement of the claim, as in England, on equitable grounds. It has been held in England (*a*), that a jury “may even allow nothing in name of interest, in case they are of opinion that the delay of payment has been owing to the fault of the holder.” But it does not appear that such a plea would be admitted in Scotland, in answer to the statutory claim of interest. Such a claim is equally available in Scotland against the parties themselves, and against their bankrupt estates. Interest is recoverable from the dates mentioned by statute against all the parties to bills or notes. Indeed, it would seem, even on general principles, that the drawer and indorsers, by making themselves responsible for the acceptor’s or granter’s failure in payment, become thereby liable for the interest chargeable against him, as a consequence of his failure. In Scotland, interest runs in all cases till payment (*b*). The legal interest, 5 *per cent.*, is to be contemplated (*c*), unless there is a stipulation to the contrary (*d*) ; ‘and there is no limit now to the rate which may be stipulated (*e*).’

expressly stipulated in bills or notes, can be recovered by summary diligence. But, on reconsidering the Act 1681, c. 36, with regard to bills, and the 12 G. III. c. 72, which extends it to promissory-notes, I think that they admit the extension of summary diligence to the interest as well as principal sums in bills or notes, and that the practice, which is to include such interest in letters of horning or other warrants for summary diligence, is correct.

(*a*) *Per* Bayley, J., in *Cameron v.*

Smith, 2 B. and A. 308 ; *Du Bellois v. Lord Waterpark*, 1822, Bayley, 351, note 45, 1 D. and R. 16.

(*b*) 1681, c. 20.

(*c*) *Smith v. Barlas*, 15 Jan. 1857, 19 D. 267. This rate of 5 *per cent.*, however, rests on custom ; and if interest were to rise or fall much in the market, there is no reason for supposing that the interest to be allowed by the Court must remain stationary. See *Bouk v. Blackwood*, 11 Jan. 1695, 4 Br. Sup. 240.

(*d*) *Antea*, p. 15.

(*e*) 17 & 18 Vict. c. 90.

3. *Exchange and Re-exchange.*

The next claims connected with bills, not with promissory-notes, are for exchange and re-exchange. These claims arise as to bills drawn in a different place or country from that in which they are accepted and are payable.

When a person residing in one place or country owes money to a party residing in another place or country, he does not in general pay his debt by transmitting the money, which would occasion expense and risk, but endeavours to find out some person who has money to receive in the place where his debt is payable, and, paying him the amount of the debt, gets from him in return a draft to the same amount on his debtor in favour of the person to whom his own debt is payable; which draft being sent to and presented by the payee, and accepted and paid by the drawee, extinguishes the payee's claim on his debtor who procured the draft. If this debtor wishes also to bind himself to his creditor *ex facie* of the draft, he may take it payable to himself, and then indorse it to his creditor. Such a draft from one country to another is a foreign bill, and from one place to another in the same country is an inland bill. These bills are easy or difficult to procure, according to the relations of debt or credit subsisting between the two places or countries betwixt which they are required. For instance, if, on the whole transactions between London and Paris, there are, at any time, more debts due from Paris to London than from London to Paris, a person in London who owes money to another person in Paris will have no difficulty in getting a draft on Paris for its amount, on paying the money to the drawer in London; on the contrary, the latter, having a debt due to him in Paris, and wishing to save the expense and risk of its transmission thence, will be glad to receive the money in London, on condition of giving a draft for it on Paris. In such a case, the number of persons in London willing to give such drafts for money paid to them in London will be greater than the number of persons wishing to purchase drafts; and hence, drafts on Paris will sell at a discount, or for less than the sum which they will entitle the holder to receive in Paris. This discount, which is in fact a sum paid by the maker of the draft to get ready money in

Exchange.

London for an order of payment on his debtor in Paris, is called exchange; and the course of exchange is said, in this case, to be against Paris. It is also in favour of London, because the number of persons in Paris owing money in London, and wishing to purchase drafts payable in London to their creditors, being greater than that of persons in Paris who have claims on London, and wish to sell such drafts, these drafts, not being supplied in proportion with the demand, will bear a *premium* in Paris, or a person who wishes a draft will pay more for it than the sum which it will entitle him to receive in London. This *premium* is likewise called exchange. On the other hand, if the debts due in Paris to persons in London are smaller than those due from London to Paris, drafts from London on Paris, being few in proportion to the demand for them by the persons wishing to pay debts at Paris by means of them, will be sold at a *premium*; and drafts from Paris on London being numerous in proportion to the demand for them, will be sold at a discount. In this case, the course of exchange is in favour of Paris, and against London. In all these cases, the balance due from the one country to the other, after setting off their mutual debts against each other, must be paid by the transmission of *specie*, or, which is the same thing, by buying drafts from bankers on their correspondents abroad, with whom they have a sufficient supply of money to meet the drafts. It is the expense of purchasing and transmitting this balance in *specie*, whether laid out or paid to the banker who furnishes it, which regulates the *premium* for drafts at a place against which the exchange is, and the corresponding discount on drafts at a place where the exchange is in its favour. The rate of exchange, therefore, so far as regards the balance to be sent from one country to another, is affected, not merely by the state of their mutual dealings, but also by the price of *specie* in the two countries, which enters into the expense of procuring and transmitting this balance. There is also another element, viz. the expression of the value of *specie* in the currency of the two countries, or the value of these different currencies compared to bullion, and consequently to each other. Lest there should be a fluctuation in this relative value betwixt the date of a bill and its term of payment, it is expedient, when the draft has been paid for in one currency, and is payable in another, to express in it the rate at which payment has

been made, and at which the one currency is converted into the other ; so that if, from an intervening change in the relative value of the two currencies, the same amount of currency which was paid for the bills cannot be got for them at the term of payment, the drawer and indorsers must make up the difference, as part of the value which they received (*a*). The acceptor, too, on the grounds to be immediately stated, must be liable to this consequence, as resulting from one of the stipulations in the bill which he has accepted.

This explanation will enable us to understand also what is meant by re-exchange. When a draft from one place on another is not accepted by the drawee, or though accepted, is not paid, the person who has got it, in order to pay by means of it a debt due by him where it is made payable, must raise money there otherwise to satisfy his creditor ; or, what is the same thing, the creditor, as holder of the dishonoured bill, is entitled to do so in order to pay himself. But the most natural way of doing so is to draw a new bill on the drawer of the dishonoured bill, and to sell this draft for money to some person who wishes to make a payment, by such a draft, where it is made payable. If the debts due from the place where it is made to the place where it is payable, are greater than those due from the latter to the former, the demand for such drafts will exceed the supply, and the drawer, instead of selling his draft at a discount, will get a *premium* for it. But when the debts due from the place where it is payable to the place where it is drawn are greatest, there will be more persons wishing to raise money on such drafts than to give money for them, and they will be sold at a discount. This *premium* or discount is also affected, as already stated, by any change, betwixt the date of the bill and the term of payment, in the relative value of the currencies of the country where it is drawn and that where it is made payable. But, as full value has been paid for the original bill to the drawer, the holder is entitled, on its dishonour, to raise money to its full amount, at his expense, in whatever currency or at whatever rate of exchange it was payable ; and therefore, if a re-draft on him for this amount cannot be sold but at a discount, the holder may add as much to his re-draft as will cover both the discount and the amount of the original bill. This sum so added to

(*a*) So found by the Lord Chancellor in *ex parte Hoffman*, Cooke, B. L. 194.

the re-draft is termed re-exchange. When a *premium*, or, in other words, when exchange has been paid for the original bill at the place where it was drawn, a re-draft, such as that now mentioned, at the place where the first bill was payable, must be sold at a discount ; or, in other words, there must be re-exchange on it (unless the course of exchange between the two places has altered during the interval) ; because the course of exchange must be against the place where the original bill was drawn, and in favour of the place where the re-draft is made. On the other hand, if the original bill has been sold at a discount, from the circumstance of the exchange being in favour of the place where it was drawn, and if the course of exchange has not been altered between the date of it and of the re-draft, the latter, instead of^{*} being sold at a discount, will bear a *premium*, and consequently no re-exchange can be charged against the drawer of the original bill. In the case supposed, the claim for re-exchange will correspond to the *premium* paid for the original bill. The drawer of the original bill is liable for re-exchange, because, as he has got full value for the bill, he must make good its amount where it was payable, to the person who gave value for it ; or, in other words, must pay the re-draft for such a sum as will cover both this amount and the discount. His liability, too, will be the same, whether the re-draft has been made by the debtor who purchased the original bill, or by his creditor, as the person to whom that bill is payable, and who, therefore, as coming in right of his debtor, is entitled to re-draw for its amount. Any holder of the original bill, being entitled to receive its amount at the place of payment, has also a right, failing payment of it, to raise its amount at that place at the drawer's expense by a re-draft on him (a).

These remarks as to exchange and re-exchange on foreign bills, apply equally to inland bills drawn from one place on another, as the course of exchange betwixt them depends on the same principles as betwixt one country and another. They are also applicable where a person gets an indorsation for value in one place, to a note granted by a party residing in another place, and payable there, but does not recover payment ; for, in that case, he is entitled to raise the amount of the note in the place of payment by a re-draft

(a) The nature of exchange and re-exchange is explained very briefly and clearly by Pothier, *Contrât de Change*. Nos. 52 and 64.

on the indorser; and if this can only be done by paying re-exchange, that must be chargeable against the indorser.

It is not necessary, to give the holder of the original bill a claim for re-exchange, that he should re-draw on the drawer of that bill; for, although he has raised the amount of the bill otherwise, it will be presumed that he has incurred as much expense in doing so as by a re-draft (*a*). In one case (*b*), re-exchange seems to have been found not due, as there was no re-draft. But it is justly observed (*c*), that such a re-draft is not required by the Act 1681, and the decision would not now be followed. It is enough that there is a course of exchange betwixt the place where the original bill was drawn, and that where it is payable, by which the loss that the holder has suffered may be estimated. But if there is no such exchange, either direct or circuitous, re-exchange cannot be claimed, because the holder of the bill could not have incurred any (*d*). He may, however, in such a case, be entitled to the damage incurred from not obtaining money for the bill at the place of payment, though not in name of re-exchange. But it will not be an objection against a claim for re-exchange, that there is no *direct* course of exchange; for, if it is possible to draw from the one place to the other circuitously, through another place, the holder will be entitled to the circuitous re-exchange thence arising, as it will be held to be

How claim for re-exchange preserved.

(*a*) In *De Tastet v. Baring*, 1809, 11 East. 265, where the question was, Whether the indorser of certain bills was liable to the indorsee for re-exchange? Lord Ellenborough left it to the jury to find re-exchange due, if the plaintiffs "had either paid or become liable for re-exchange themselves;" and this direction was approved of by the Court. The case was decided on another ground, to be afterwards noticed.

(*b*) *Forbes*, 201, *Boick v. Blackwood*.

(*c*) *Forbes*, *ibid*.

(*d*) In the preceding case of *De Tastet v. Baring*, the claim of re-exchange was left with the jury, as depending on the fact, whether there was then any course of exchange betwixt Lisbon, where the bill was payable,

and London, where it was drawn; and they rejected the claim, on the ground (as the Court afterwards held), that there was then no such course of exchange. At the time when the bill, which was drawn in London upon Lisbon, became payable, the latter place was in possession of the French, who had excluded the English from it, and it was blockaded by an English squadron. It became therefore a question, whether there could legally be any re-drawing, or consequently any re-exchange with a country which was then hostile to this country. But this question was not decided, the Court holding, as already mentioned, that the jury had decided on the ground of there not being then, in fact, any course of exchange betwixt Lisbon and this country.

his only expedient for raising the amount of the bill at the place where it ought to have been paid. In the case last cited (*a*), although there was an instance or two, when the bill in question was dishonoured, of an exchange of bills betwixt Lisbon and this country "through the medium of other bills on Hamburgh and America," the claim for re-exchange was rejected, as there was not then any regular course even of circuitous re-exchange. But, in another case (*b*), where a note had been accepted payable at Paris, Dover, or London, according to the course of exchange on Paris, and, when the note became payable, the direct exchange between Paris and this country was interrupted by a war with France, the defendant was held liable, not by the direct course of exchange when the note was granted, but according to a circuitous course of exchange through Hamburgh, which was the only exchange that existed when it became payable. It might have been doubted, whether a re-draft from Paris on London would have been then lawful, seeing France was at war with this country. But the holder's claim to circuitous re-exchange was sustained, from the necessity of the case.

Circuitous
re-drawing.

No doubt, when, without such necessity, the holder re-draws circuitously for his own convenience, he cannot claim circuitous re-exchange. But if the bill, before it reaches him, has been indorsed by several parties at different places, he is entitled to re-draw on the last indorser, or on any previous indorser, for its amount, and for re-exchange, as between the place of payment and such party's residence; and each indorser being entitled to re-draw thus on his previous indorser (adding always to the re-draft, the re-exchange between their respective places of residence), the drawer, on whom the first indorser is entitled to draw, will thus be liable for the accumulation of all the different re-exchanges which have been incurred between the several indorsers. Thus, in the case (*c*) of a bill drawn from London on Paris, which, after being indorsed to two parties at Amsterdam successively, came at last into the hands of a person in Paris, who, on its being dishonoured, re-drew for

(*a*) *Antea*, p. 443, note (*d*).

(*b*) *Pollard v. Herries*, 1803, 3 Bos. and Pull. 335. The doctrine stated in the text was laid down, in this case,

unanimously by the Court of Common Pleas.

(*c*) *Mellish v. Simeon*, 1794, 2 H. Bl. 378, decided by the Court of Common Pleas.

re-exchange on his indorser at Amsterdam, it was decided that the original drawer in London was liable, not merely for direct re-exchange between London and Paris, but for the whole re-exchange occasioned by re-drawing circuitously through Amsterdam. It has been said, that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places (*a*). But such a permission is implied by the drawer issuing a negotiable document, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder, being entitled, in case of its dishonour, to re-draw on any previous indorser, in order to make good his recourse against such indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonour, must be liable for the accumulated re-exchange arising on the successive re-drafts, because that results from the negotiability of the document which he has issued.

The Act 1681, c. 20, provides, that the holder of a bill shall be entitled, in case it is dishonoured, to recover both exchange and re-exchange. Exchange, as already explained, is the premium sometimes paid in one place for procuring a bill there to be paid in another place. But all which the holder of the bill can require, on the other hand, is, that he should get back the amount of the bill which he has thus bought. He is therefore entitled to re-exchange only as the necessary expense of raising the amount of it by a re-draft on the original drawer or the indorser. But, by thus getting its amount, he is fully indemnified, and is not entitled, *besides*, to the exchange, because that would be to repay him again part of the value given for the bill. The meaning of the Act, as interpreted by Forbes (*b*), is, that, if the holder of a dishonoured bill gets exchange, or the amount of the *premium* which he has paid at the place of drawing, it must be deducted from the re-exchange claimed by him, so that he will get nothing as re-exchange but the sum by which the discount paid in raising money on the re-draft exceeds the *premium* paid for the original bill. There cannot be such an excess, unless the rate of exchange betwixt the two places has fluctuated between the dates of the draft and of the re-draft, since it

Recovery of
exchange and
re-exchange.

(*a*) Forbes, 156; Glen, 274-5, 2d edit.

(*b*) 154.

has been shown, that, if it remains the same, the discount on the re-draft must be equal to the *premium* on the bill. In this last case, the bill-holder, if he gets the amount of exchange, can have no separate claim for re-exchange. But, although this seems to be the true explanation of the Act, the simplest way probably is, to consider re-exchange as meaning the whole discount, without deduction, which is paid in raising money on the re-draft, and to allow this alone, as is done in England, without reckoning anything separately for exchange. The only case in which the other rule now mentioned must be adopted in Scotland, is where a certain sum is expressly mentioned in the bill as exchange, in which case there may, according to the Act 1681, be summary diligence for it, as well as for the amount of the bill. In all other cases, it, as well as the re-exchange, which from its nature cannot be ascertained beforehand, is recoverable by ordinary action, or, according to the Acts 1681 and 1696, may be added to the charge in case of a suspension.

Is acceptor
liable for re-
exchange?

Although the drawer and indorsers are undoubtedly liable for re-exchange, it has been much disputed whether the acceptor is liable. In England, it has been repeatedly held that he is not. The ground of these decisions appears to be, that the drawee, by his acceptance, becomes liable only for the sum in the bill with interest, and that re-exchange is a species of indirect damage, for which he is not bound (*a*). But it is in truth damage arising

(*a*) In *Napier v. Schneider*, 1810, 12 East. 420, which was an action against the acceptor of a bill drawn in Scotland and accepted in England, but not paid, the Court of King's Bench, on being moved to direct the Master to tax, not only principal, interest, and costs, but re-exchange, refused the last, saying that the acceptor only bound himself according to the law of the country where he accepted, leaving to the holder his recourse over against the drawer, and that they would only refer to the Master to compute what was due on the bill itself.

In *Woolsey v. De Crawford*, 2 Camp. 445, which was an action against the acceptor of a bill drawn at Quebec and accepted in England, the plaintiff hav-

ing demanded 10 *per cent.* as re-exchange, which he said that he had been obliged to pay, Lord Ellenborough observed, "You may as well state, that, by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage." His Lordship then proceeded to say, that the proper recourse for such claim is against the drawer, who "undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences," but that the acceptor's contract is only to pay the sum in the bill, with interest at the legal rate, when it is due. A similar opinion was intimated by Lord Tenterden in *Darson v. Morgan* (K. B. 1829), 9 B. and Cr. 618.

directly from the acceptor's breach of contract, being the expense of raising the amount of the bill in the readiest way, to obviate the consequences of its non-payment. It is not, therefore, like the case put in one of the decisions, where money is raised by mortgage in consequence of non-payment of the bill, since there is no necessary effect of non-payment. If the drawer or indorser is liable for such damage to the holder, there seems to be no reason why the acceptor, who is more immediately bound to him, should not also be liable for this direct consequence of his breach of contract. Further, it has been justly remarked (*a*), that the acceptor would reap no benefit by being free from the holder's claim, since the drawer, who is liable to the holder, would have a claim of relief against him. But he appears to be directly liable for this claim, as much as the drawer. Accordingly, in the old law of France (*b*), he was liable for re-exchange, although the modern law of that country does not clearly enact his liability (*c*). In England, a learned writer on bills of exchange (*d*) suggests that he ought to pay it.

In an English case (*e*), where certain bills had been drawn from Philadelphia on London, and accepted there, but not paid, and where it appeared that, by a law of Pennsylvania, the drawer and all concerned were liable for 20 *per cent.* advance, as damage, on all bills drawn on Europe and returned protested (which sum was alleged to be partly on account of re-exchange, as there was no course of exchange with London, where the bills were payable), the Lord Chancellor decided, that the drawer, who had drawn the bills by desire of a third party in payment to him, was entitled to prove for this claim of damage on the acceptor's bankrupt estate, he alleging that he had paid, or was liable to pay it. The decision turned on a question peculiar to English bankrupt law, viz. whether such a claim was a contingent debt, or an actual debt at the time of the original contract. But it was admitted to be a good claim

(*a*) 1 Bell, 407.

(*d*) Bayley, 353, note 49.

(*b*) Pothier, No. 117. Depuys de la Serra, Chap. 15, and Chap. 16, §§ 1, 2.

(*e*) *Francis v. Rucker*, Ambler, 672.

(*c*) *Vide* Code de Commerce, T. 8, § 13, No. 182, which seems rather to imply that the drawer and indorsers are alone liable for re-exchange.

The same case is cited in 2 Brown's Chancery Cases, 599. But the account of it given there is taken from the Report by Ambler.

against the acceptor, whether against his bankrupt estate or not. This case seems to prove that the drawer at least is entitled to claim re-exchange from the acceptor. It has been said (a), that the decision was given on the ground of the claim in question consisting of conventional damage. That ground of decision, however, was admitted only as to the ranking of the claim on the acceptor's estate, in order to prove that it was a subsisting claim at the date of the bill, which, by the law of England, might be ranked, not a contingent claim, which could not have been ranked. But it was not disputed that such a claim, whether contingent or not, would have been competent against the acceptor. Though called a claim of damage, it included re-exchange; and indeed re-exchange, in all cases, is a species of damage. But, if the acceptor is liable for it to the drawer, he seems to be equally liable to the holder.

Reasons for
affirming his
liability.

It has been urged (b), against the acceptor's liability for it, that he has no concern with the loss which the drawer or indorser may sustain by being obliged to repay more as re-exchange than they have got as exchange, as that arises from the circumstance of the drawer taking payment of his debt by a bill, with which the acceptor, being liable to him merely in the debt, has no concern. This argument, however, 1st, is opposed to the decision now cited, which implies that *the drawer* has a claim against the acceptor for re-exchange. 2dly, It is not applicable to the *indorser's* claim for re-exchange; because an indorser has no concern with the acceptor's original debt to the drawer, but looks only at the absolute acceptance which, on non-payment, must subject the acceptor to re-exchange, as damage arising from his breach of acceptance. 3dly, Even as to the drawer, the acceptor substitutes his absolute acceptance, with all its consequences, for the original debt. He is primary debtor; and whatever damage the drawer and indorsers are liable for to the holder from his non-payment, he must refund, as they were entitled to rely on the fulfilment of his acceptance. To the drawer his liability for re-exchange as damage is more direct, inasmuch as he is directly liable to him under his original obligation. But it has been said further, that the drawer or holder receives value for the re-exchange, if he recovers the amount of the bill from the acceptor at the place of payment, as its amount there is just what it would

(a) Glen, 272, 2d edition, note.

(b) *Ibid.*

be *plus* the re-exchange, if payment were made at the place where it was drawn. This remark does not include the case where the acceptor makes payment at a different place from the proper place of payment; and indeed it is admitted that, in such a case, he must pay re-exchange between the place of actual payment and the place where it should have been made. Moreover, with reference to the case of payment being made at the proper place, it is here erroneously assumed, that the acceptor pays the bill when re-exchange is incurred by the re-draft, whereas it is his non-payment that makes the re-draft necessary. Although, therefore, payment of the bill by him at the time of the re-draft might cover the re-exchange due then, it may not do so afterwards, because it may be recovered (after a re-draft has been made at a certain discount), when it bears a smaller discount; and when, therefore, cash at the place of payment is proportionally of less value than at the time of the re-draft. The holder or any party in right of the bill is entitled to recover from the acceptor the difference occasioned by this fluctuation, as they have suffered loss to that extent through his failure to pay. But, besides, the argument now stated overlooks the accumulated re-exchange arising from re-drafts that may be made circuitously, first by the holder on his immediate indorser, and then by each indorser on the prior indorser up to the drawer. Such re-drawing, with all the re-exchange consequent on it, has been held chargeable against the drawer, or any indorser with whom the re-drawing terminates, in respect of their having drawn or indorsed an instrument which was thus negotiable; and the same claim seems to be competent against the acceptor, from his acceptance of it. He is liable therefore, *nomine damni*, for all re-exchange, whether direct or circuitous, incurred by the person who holds the bill when payment is recovered from him.

In the case (a) of a bill for 2800 star pagodas drawn in this country on India, discounted in India by the payee with the plaintiffs, who gave him the then current rate of exchange for it, the bill being returned protested for non-acceptance, the plaintiffs were found entitled to claim from the defendant at the rate of 10s. *per* pagoda, besides 5 *per cent.* on its amount from the expiration of thirty

Rates of re-exchange.

(a) *Auriol v. Thomas*, 1787, 2 T. R. 52, decided by the Court of King's Bench.

days after notice to him of its return, this rate being established by usage in such cases, in order to cover exchange, interest, and all incidental charges. There does not appear to be any separate rate of re-exchange between this country and India.

4. *Damage and Expenses.*

Damage and expenses.

The Act 1681, c. 20, further authorizes the recovery of damage and expenses by an ordinary action, or by adding them to the charge in case of a suspension. Damage refers to nothing but the direct loss occasioned by want of the money, and cannot relate to consequential loss, for instance, to the privation of profit which the holder might have got by employing the proceeds of the bill in some commercial speculation. In an old case (*a*), it was decided that damage was not necessarily restricted to the legal interest. When a bill drawn abroad on England has been dishonoured only in part, damage is allowed only in proportion to the sum for which it is dishonoured, not on its whole amount (*b*). Under the head of expense, on the other hand, are comprehended all expenses incurred through non-payment of the bill or note, such as the expense of protesting and notifying its dishonour, the commission paid for an agent's trouble in raising money on the re-draft, etc. The rule as to the expenses of diligence on bankers' notes has been already explained (*c*). It has been decided in England, that an indorser is not entitled to recover from the acceptor the costs of an action against him by the last indorsee, though the result (it was said) would have been different if the acceptor had applied to stay proceedings against himself (*d*). In another case (*e*), where an accommodation-acceptor of a bill had been obliged to pay the costs of two arrests, by an indorsee, one against himself, and the other against the party for whom he had accepted, he was found not entitled to recover these costs against a party who was held to have improperly

(*a*) *Bouk v. Blackwood*, 11 May 1695, 4 Br. Sup. 240.

(*b*) *Laing v. Barclay*, 3 Stark. 41.

(*c*) *Antea*, p. 429.

(*d*) *Dawson v. Morgan* (K.B. 1829), 9 B. and Cr. 618; but *vide* Chitty, p. 440, and cases there cited.

(*e*) *Roach v. Thompson*, 4 C. and Pay. 194. *Vide* also, to the same effect, *Bleaden v. Charles*, C. P., 7 Bingh. 246; and *Stoven v. Taylor*, 1 Nev. and Mann. 250. But *vide* Chitty, 440, and cases there cited.

given it to the holder, in respect that he should have paid it to the holder immediately, without costs.

It has been said, that the drawer is not liable to re-exchange, if payment should fail through the acceptor's intervening death; because re-exchange is a species of damage, and he ought not to be made liable in damage for an occurrence which he could not foresee or prevent (*a*). But, as both the drawer and indorser guarantee payment absolutely, they should be liable for re-exchange on non-payment. It is claimed from them not *in pœnam*, but as a reparation to the holder for non-performance of the contract which they have guaranteed. Even the acceptor's estate appears to be liable for re-exchange in such a case, since he was bound to have left funds to meet his acceptance (*b*).

SECTION IV.

PROOF AGAINST THE SEVERAL PARTIES TO BILLS OR NOTES.

1. *Proof of the making of the Bill.*

It must be proved that the bill or note was made or executed. It is necessary in most cases to do this by the best evidence, viz. the document. But, if it has been lost or destroyed, its contents may be established, as already mentioned (*c*), by a proving of the tenor. In such a process, writings referring to the writ which has been lost are sometimes necessary, as adminicles of evidence, to show that it existed. But in personal obligations, to which often no other writings bear reference, such adminicles are dispensed with, and parole evidence of their contents is accounted sufficient (*d*). A

Proof of the bill having been made.

(*a*) Forbes, 157-8, who cites *Kennedy v. Hutchison*, 8 July 1664, M. 1496, where the payment of a bill having been retarded by the acceptor's death, the Court found that there was neither exchange nor re-exchange, as there was no *mora*; but that the drawer, as well as the acceptor's representatives, were liable only in

the single value. It may be doubted whether this decision would be now followed.

(*b*) As to the question how far these claims bear interest, *vide* Chapter on Bankruptcy.

(*c*) *Antea*, 284 *et seq.*

(*d*) *Ersk.* iv. 1, 55; *Dickson on Evidence*, §§ 110-133.

copy of the bill, if it can be procured, will be admitted as good evidence (a).

Signatures
presumed to be
genuine.

When the original bill or note is forthcoming, it is not necessary in Scotland, as in England, to prove the signatures of the parties. The document is held to be probative, both as to the genuineness of the date and of the signatures, unless it is alleged that they are not genuine. In that case, it would appear that the party alleging forgery must prove it (b), otherwise the genuineness of the signatures will be presumed (c). This presumption, that the signatures are genuine, is applicable to indorsements, when founded on to complete the holder's right; for instance, to an indorsement, whether general or special, by the payee to the holder. It will likewise be presumed, in case of action or diligence on a bill or note payable to a particular person or specially indorsed, that the possessor of the document is payee or special indorsee, although that presumption may be redargued by contrary evidence. The debtor, however, cannot safely pay to the possessor of the bill or note, without being

(a) Such doctrine was held by Holt, C. J., 1 Lord Raym. 731, in a case where the defendant had torn his own note. See Dickson, §§ 134-150.

(b) *Vide Alison v. Gordon*, 17 Dec. 1701, M. 16705-6, where the proof appears to have been thrown on, and undertaken by, the person alleging the forgery. The same course appears to have been followed, since jury trial was introduced in Scotland. *Vide Hepburn v. Cowan*, 14 July 1817, 1 Murr. 261; *Lindsay v. Gilchrist*, 12 July 1822, 2 Murr. 97; *Syme v. Marshall*, 26 Sept. 1825, 2 Murr. 536.

(c) *Per* President Boyle: "The burden of proof undoubtedly lies upon the party who impugns the signature;" *Gellatly v. Jones*, 11 Mar. 1851, 13 D. 961. This rule (as will further be seen from the cases referred to in the first part of the next article) seems now too well settled in practice to be disturbed; but it has not escaped criticism, and exceptions have been suggested. Lord Moncreiff, speaking of an action on a bill, to which the defence

was forgery, says: "The Sheriff laid the onus on the pursuer of the action, as the party founding on an instrument no way authenticated, except by a subscription *alleged* to be that of the apparent obligant, the body of it *being in the hand* of the author of the party founding on it as creditor. There seems to be much reason in this; and though it has not been always observed, and might, if not cautiously administered, be liable to abuse, the Lord Ordinary thinks, and has long thought, that it is in many cases the just principle. For to put a man to prove the *negative*, that certain words or letters are *not* of his writing, merely because another has impudently put the paper in circulation,—where there is no statutory attestation, and no evidence whatever of his having written it is offered,—has always seemed to him to be a system which in many situations must be calculated to expose innocent parties to the skilful machinations of sharpers." *Macdonald v. Gilmour*, 9 Mar. 1839, 1 D. 706.

certain that he is *in titulo* of it, because the latter cannot otherwise give a valid discharge of the debt.

2. *Proof of Defences.*

Although there is a presumption in favour both of the holder's right, and of the obligations arising from the several signatures, this presumption may be redargued,—

1. By proving that any of the signatures is not genuine. Such a forgery is truly no signature. No reduction therefore is necessary to absolve him, as the signature is not his deed. Its falsehood may be pleaded by exception, either in defence against an action, or as a ground for suspending diligence (*a*). The mode of proceeding with reference to such an exception, which is applicable also to other deeds, need not be here detailed. 'It is a question for a jury, whether the bill is forged or not. When the person impugning the signature has obtained an issue of forgery, it is competent, whether the issue have been allowed in an action (*b*), or in a suspension (*c*), for the person supporting the signature, if he have laid the requisite foundation in his record (*d*), to obtain an issue of adoption. But the issues of forgery and adoption must be separate, the impugner standing pursuer in the former and defender in the latter (*e*). If an issue of forgery alone be allowed, it is incompetent to lead evidence of adoption in reply to it (*f*). The cases in which caution or consignation is required in suspension on the ground of forgery, have already been noticed (*g*).'

Defence of forgery.

(*a*) In *Alison v. Gordon*, 17 Dec. 1701, M. 16705, forgery was allowed to be proved in a suspension of a charge on a bill. *Vide* a detail of this case in *Forbes*, 32–6. In *Robertson v. Alisons*, 7 Dec. 1743, M. 6774, and *A. v. B.*, 16 June 1747, Morr. *ibid.*, forgery was also allowed to be proponed by exception in a process of suspension, although, in the latter case, there appear to have been, besides, separate processes of improbation. Indeed, the competency of proponing falsehood by exception is recognised so early as the Act 1557, c. 63, which contemplates

the proponing of it in this way, as well as by way of action. *Vide* the same doctrine in *Stair*, iv. 41, 39; *Bankton*, i. 10, 217; *Ersk.* iv. 4, 68.

(*b*) *Miller v. Little*, 22 Jan. 1831, 9 S. 328.

(*c*) *Findlay v. Currie*, 7 Dec. 1850, 13 D. 279.

(*d*) As to what are relevant statements of adoption, see *antea*, p. 218.

(*e*) *Rathbone v. Glenny*, 18 Mar. 1833, 11 S. 574.

(*f*) *Gellatly v. Jones*, 11 Mar. 1851, 13 D. 961.

(*g*) *Antea*, p. 407.

Evidence.

‘The evidence in cases of forgery may consist of the evidence of parties familiar with the handwriting of the impugner, of the evidence from comparison of the alleged forgery with genuine writings of prior date, of the evidence of engravers or other experts, and of any evidence of the circumstances attending the making and circulation of the bill in dispute, tending to satisfy the jury as to whether it is genuine or not. It would not be sufficient to rest on any one of these kinds of evidence; and on the evidence of experts in particular, little reliance is to be placed (a). It is competent for the pursuer of the issue of forgery, to prove that other signatures to the bill besides his own have been forged (b); that his own signature has been forged to other bills in similar circumstances (c); and, indeed, he has been allowed to prove that the drawer of the bill is a notorious forger (d); and on the same principle he would be allowed to prove previous specific acts of forgery (e). It would seem, however, to be unjust to allow him to enter on such lines of proof without previous notice of them in the record; but it is right to mention, that in criminal cases somewhat similar lines of proof have been allowed, with doubtful justice, to be gone into, without notice. Thus, in charges of forging and uttering base coin, previous instances of uttering, where necessary to establish guilty knowledge in the accused, have been allowed to be proved, though not mentioned in the indictment (f).’

It may be urged against payment of a bill or note,—

Defence of
vitiation.

2. That it has been altered or erased *in essentialibus* since it was signed. The grounds and limits of this defence have been already explained (g). It may be pleaded either against an action, or in a suspension of a charge, without a reduction of the bill or note (h);

(a) See Dickson on Evidence, §§ 918–933.

(b) *Gellatly v. Jones*, *ut supra*.

(c) *Troup v. Begg*, 22 Dec. 1838, 1 D. 356.

(d) *Mill v. Littlejohn*, 1 Dec. 1838, 1 D. 137.

(e) In England such evidence is not admissible: *Viney v. Barss*, 1 Esp. R. 293; *Balbetti v. Serani*, Peake’s R. 142; *Griffiths v. Payne* (Q. B. 1859), 11 A. and E. 131.

(f) *Ritchie*, 29 Nov. 1841, 2 Swinton, 581.

(g) *Antea*, p. 109.

(h) In *Graham v. Gillespie*, 27 Jan. 1795, M. 1453, the effect of a vitiation such as that now mentioned was discussed in the suspension of a charge on the bill. There does not, indeed, appear to have been ever any objection made against the competency of discussing it in this form.

for it implies, that the bill or note, not being the instrument which the objector subscribed, is not truly his obligation, and cannot, though unreduced, be effectual against him.

‘In England,’ it has been held not competent, in order to prove the alteration or erasure of a bill or note, to ask any question as to other bills or notes alleged to have been altered, because this is to try other issues, which the opposite party is not prepared to meet (*a*). ‘In Scotland, the admissibility of such evidence would be regulated by the principles which regulate the practice in admitting similar evidence in cases of forgery.’

3. Although a party should have signed a bill or note, he will not be bound if he has not given his consent, as where he has been forced to sign, or is incapable of giving it, or has been incapacitated by law, as in the case of a pupil, or a minor without consent of his curators (*b*), or a married woman (*c*). In all these cases, it may be pleaded at once, by way of defence or suspension, that the bill or note is not the deed of the party (*d*). ‘In the second edition of this work, some doubt was expressed by the author, whether it would not be necessary for a suspender, who alleged fraud and circumvention, to bring a reduction also in order to get rid of the effect of his having *de facto* subscribed; but it is now settled that all such questions may be competently and completely settled in the suspension (*e*).’

Defence of
fraud and cir-
cumvention.

4. When a bill or note is granted for a consideration void at common law, as for an immoral consideration, or one declared illegal by statute, as for a smuggling consideration, or for money won at play, there is a nullity in all cases against the party privy to the illegality (*f*), and in some cases by express statute, against

Defence of
illegal con-
sideration.

(*a*) *Thompson v Moseley*, 5 C. and Pay. 501, and *Nisi Prius* cases there referred to.

(*b*) See *antea*, p. 129: where the minor acts with consent of his curators, or has none, a reduction is necessary. *Antea*, p. 130.

(*c*) *Antea*, p. 136.

(*d*) In *Wightman v. Graham*, 6 Dec. 1787, M. 1521, where a bill was said to have been obtained through concussion, this plea was stated success-

fully, without a reduction, in defence against an action for payment of the bill. In an English case, *Sentance v. Poole*, 3 C. and P., a note drawn in an unusual form, and signed by a party who was proved to be utterly imbecile, was held to be void, even in the hands of an onerous indorsee.

(*e*) *M'Queen v. Thomson*, 3 Dec. 1842, 5 D. 244.

(*f*) *Antea*, p. 67 *et seq.*

third parties (*a*), which may be pleaded by way of defence or suspension (*b*). ‘The cases in which defences grounded on the nature of the consideration, or the want of consideration, may be proved by parole, have been already stated (*c*).’

3. *Proof of Negotiation.*

Proof of due
negotiation.

The holder of a bill or note, when he brings action or diligence on it against the drawer and indorsers, must prove that he has duly negotiated it, and notified its dishonour to the party whom he sues. By the statutes already cited, he is entitled to raise summary diligence against all the parties to bills or notes, without any previous proof except the registration of the protest. But, if negotiation or notice is denied, whether in an action or a suspension, he must instruct both.

1st, He must prove that the bill or note was duly presented, and (‘where he seeks summary diligence’) protested. ‘Formerly no evidence of presentment but an instrument of protest was admitted; but presentment may now be proved by any evidence, written or parole, to the effect of preserving recourse against the drawers and indorsers. A protest is still requisite to found summary diligence (*d*).’

2d, The holder must establish that he has given notice. The requisites of due notice, as well as the kind of evidence necessary for proving it, were formerly detailed (*e*).

(*a*) See *antea*, p. 81.

(*b*) In *Morrison v. Commissioners of the Customs*, 27 Nov. 1723, Morr. 9533, the objection to a bill that it was granted for a smuggling consideration, was stated in a suspension. The same in *Wilkie v. M'Neil*, 6 Nov. 1740, Morr. 9538; also in two other cases, Morr. 9554 and 9555. In *Nelson v. Bruce*, and *Stewart v. Hislop*, Morr. 9507, and *M'Coull v. Braidwood*, *ibid.* 9518, it was pleaded, in suspension of

a charge on bills, that they had been granted for gaming debts; and though the plea was repelled, the competency of stating it in this form was not disputed. Most of the recent Scotch cases, referred to on the subject of these objections (*antea*, pp. 67–81), were suspensions.

(*c*) *Antea*, p. 54.

(*d*) *Antea*, p. 306.

(*e*) *Antea*, p. 329.

CHAPTER VIII.

PRESCRIPTION OF BILLS AND NOTES.

THE want of a definite term of prescription for bills and notes was early felt in Scotland. As they were destitute of those solemnities which the law of Scotland required in more formal deeds, it was not safe that they should endure, like such deeds, for forty years, because there was more risk, with them, of forgery or vitiation, after the lapse of time had rendered detection less probable. Besides, as the principal use of bills and notes, especially of foreign bills, which were first introduced, was held to consist in the quick transmission and speedy settlement of claims, there was the less hardship in limiting them by a short prescription, when they could not, from their nature, be intended to subsist as permanent securities. In England, it was enacted, at an early period (*a*), that the greater number of personal actions should prescribe, if not pursued within six years after the cause of action accrued; and this enactment included bills of exchange. In Scotland, on the other hand, there was no general prescription, except the long prescription of forty years, which included every cause of action; but various personal grounds of action were subjected to separate prescriptions of different periods. No such short prescription, however, was fixed for the duration of bills, even after the establishment of summary execution, both on foreign and inland bills, had shown that they were regarded as obligations which ought to be speedily enforced, and had given the means of so enforcing them. Mr Forbes, indeed (*b*), seems to think that bills were or ought to have been comprehended under the vicennial prescription of holograph deeds. But Sir George Mackenzie (*c*) states, from recollection, that “the Parliament expressly refused to limit bills of exchange to this time”

State of the
law prior to
the Sexennial
Act.

(*a*) 21 James I. c. 16.
(*b*) 177.

(*c*) Obs. on Parl. 2 C. II. Sess. 1,
Act 9.

(twenty years). He indeed gives a different reason for this from what might be expected. "Though these," he continues, "be holograph papers, because these being the vehicles and support of trade betwixt us and foreigners, that were to limit them by too narrow statutes." The first statement in this passage is inaccurate, since bills never were required to be holograph. Further, as they are not necessarily holograph, and ought, from their nature, to be speedily negotiated, there was good ground for subjecting them even to a shorter prescription than holograph writs. But, though these reasons for exempting them from the vicennial prescription are insufficient, there can be no doubt that they were so exempted, and this was accordingly decided in a case cited by Mr Forbes (*a*).

As a substitute, however, for a short prescription, our lawyers seem to have adopted the principle, that as bills, from their nature as commercial documents, ought to be of short duration, so, when they exceeded such a duration, they forfeited those privileges (whether as probative writs or otherwise) which the interests of commerce alone rendered it necessary to confer on them. This doctrine is laid down by Lord Stair (*b*), and was followed more or less till the sexennial prescription of bills or notes was established. But there was an endless fluctuation of judgments as to the period in which a bill lost all its privileges; and, indeed, in most instances, this matter was decided not merely with reference to the duration of the bill, but with regard to all the other circumstances of the case, as, for instance, to the fact of the original obligant being alive or dead, of his denying his subscription or not, or of his alleging payment. Those who wish to examine the grounds (not very consistent with each other, or with any fixed principle) on which the Court sometimes sustained, and at other times refused, action on such bills or notes, may consult the cases cited below (*c*).

(*a*) *Lesley v. Menzies*, 4 Feb. 1692, Forbes, 177, M. 16971.

(*b*) iv. 42, 6.

(*c*) *Colquhoun v. Duke of Argyle*, 21 Jan. 1767, Morr. 1645; *Moncrieff*, 7 Jan. 1752, Kilk. 91; *Lookup v. Crombie and Creditors*, 10 Feb. 1754, Morr. 1635; *Gordon v. Rigg*, 11 Feb. 1747, Morr. 1648 (reversed on

appeal on special grounds, Cr. and Stew. App. Cas. 415); *Wallace and Crawford v. Lees and Crawford*, 31 Jan. 1749, Morr. 1631; *Stewart v. Houston's Trustees*, 15 July 1760, Morr. 1638; *Wemyss v. M'Naughton*, 13 June 1766, Morr. 1644; *Wallace v. Murray*, 9 Jan. 1759, Morr. 1637; *Ker v. Ker*, 5 August 1768,

The law on this subject remained in great uncertainty, till the 12 Geo. III. c. 72 (made perpetual as to bills and notes by 23 Geo. III. c. 18, § 55), which, proceeding on the preamble, that “the not limiting bills and promissory-notes to a moderate endurance, in that part of Great Britain called Scotland, has been found by experience to be attended with great inconveniences,” therefore enacts, “That no bill of exchange, or inland bill, or promissory-note, executed after the 15th day of May 1772, shall be of force, or effectual to produce any diligence or action in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes became exigible.”

The Sexennial Act.
(12 G. 3, c. 72.)

But it is provided by § 39, “That no notes commonly called bank-notes, or post bills, issued or to be issued by any bank or banking company, and which contain an obligation of payment to the bearer, and are circulated as money, shall be comprehended under the foresaid limitation or prescription.”

Exception of bank-notes.

It is also provided by § 39, “That it shall and may be lawful and competent, at any time after the expiration of the said six years, in either of the cases before mentioned, to prove the debts contained in the said bills and promissory-notes, and that the same are resting owing, by the oaths or writs of the debtor.”

Proof by writ or oath after the six years.

It is provided by § 40, “That the years of the minority of the creditors in such notes or bills shall not be computed in the said six years.”

Minority.

‘The sexennial prescription of bills or notes is thus entirely the creature of statute. The period of six years was fixed upon, as assimilating the Scotch law in some measure to the law enacted in England by the statute of limitations (a). The two laws, however, were not rendered in all respects identical; and it has been left

Nature of the sexennial prescription or limitation.

Morr. 1648, in all of which action was dismissed; *Forrester v. Elphinstone*, 13 Nov. 1742, Cl. Home, 342; *Elchies*, No. 27, *v. Bill*, where the claim was defeated by the defender’s oath; and, on the other hand, *Maxwell*, 21 Jan. 1767, Morr. 1645; *Swan v. Campbell*, 5 July 1734, Morr. 1627; *Hamilton*,

10 Dec. 1757, Morr. 1636; *Farquhar v. Crawford*, 28 Feb. 1751, Morr. 1635; *Hedderwick v. Strachan*, June 1728, Morr. 1626; and *Pringle v. Murray*, 18 Nov. 1760, Morr. 1648, in which action was sustained.

(a) 21 Jac. I. c. 16; and amending Acts, noticed, Chitty, p. 387.

doubtful whether what the Scotch Act introduced was of the nature of a limitation or of a prescription. The framers of the Act (§ 39) use the terms as equivalent; and it cannot be said that it has yet been determined to which the enactment is to be referred. The enactment contains two alternatives. It enacts, that “no bill, etc., shall be [1] *of force*, or [2] *effectual to produce any diligence or action*,” unless certain steps be taken within a certain time. If the first alternative is to be read as a separate, substantive enactment, then there is no doubt that a proper prescription has been introduced, and that, in the phraseology of Professor Bell (*a*), the bill becomes, when the prescription has attached, “annihilated.” The practical effect of this reading would be, that a prescribed bill could not be used to justify a claim of retention; and herein the Sexennial Act would differ from the statute of limitations, which does not extinguish a right of lien (*b*). The difficulty in the way of the reading is, that if it be correct, the second alternative is quite unnecessary, as being included in the first; and to get rid of this difficulty the two alternatives have been read together, the one as explanatory of the other. The practical effect of this latter reading would be, to hold the statute as introducing simply a limitation of actions; or to speak with strict accuracy, a limitation of the mode of proof in certain actions. This view seems the more prevalent (*c*), and it is the only view of importance in actions on the bill, in which questions of prescription generally arise. But whether it be finally decided that the Act introduces a prescription or limitation, it should be remembered that the Act stands alone. Nothing but difficulty and confusion has been introduced by making use of phraseology and analogies drawn from the longer prescriptions, in place of deciding each case, as it arose, on the words of the statute; and it is much to be regretted that the use of such terms as interruption (*d*), eliding, etc., has become so inveterate, that it would be almost impossible to dispense with them. The only comparison between the prescriptions which can be made with safety and advantage, is between the sexennial and the triennial.

(*a*) 1 Bell's Comm. 394.

June 1833, 11 S. 744; *Blake v. Turner*,

(*b*) *In re Broomhead*, 1847, 16 L. J.

15 Nov. 1860, 23 D. 15.

(Q. B.) 355.

(*d*) Compare *Cochran v. Prentice*,

(*c*) See *Christie v. Henderson*, 19

24 Nov. 1841, 4 D. 76.

The comparison here is truly useful, because the mode of proof, after the plea of prescription has been sustained, is in both cases the same (a).'

SECTION I.

COMMENCEMENT OF PRESCRIPTION, ITS INTERRUPTION, AND ITS EFFECT WHEN NOT INTERRUPTED.

1. *Commencement of Prescription.*

The six years of prescription, according to the terms of the Act 12 Geo. III. c. 72, run from the time when bills or notes "become exigible." Bills or notes payable at a fixed term are not "exigible" till the last day of grace, or, if that day falls on a Sunday or holiday, till the day preceding. The six years, therefore, with all such bills or notes, run from the last day of grace, or, in the case last mentioned, from the day preceding (b). So, a bill payable on demand being "exigible" whenever it is issued, it has been decided that the six years run from its date (c). This matter does not depend on the question, whether the creditor in such a bill or note may raise an action on it without making a demand (d); but on the time when he *may* exact payment, which he may do from the date of issuing (e). In a bill or note payable at sight, the six years cannot begin to run till after presentment, because the bill or note does not become

Period from which the prescription runs.

(a) *Cullen v. Smeal*, 12 July 1853, 15 D. 868.

(b) This point was so decided in *Douglas, Heron, and Co. v. Grant's Trustees*, 19 Nov. 1793, M. 11133; affirmed in the House of Lords, 3 Pat. Ap. 503.

(c) *Stephenson v. Stephenson's Trustees*, 16 June 1807, Morr. App. to Bill, No. 20. It has been decided in England, in like manner, that the statute of limitations runs from the date of bills on demand; *Norton v. Ellam*, Ex. 1837, 2 M. and W. 461.

(d) *Antea*, p. 283.

(e) A contrary rule to that now laid down regarding bills payable on demand was adopted in England, under the statute of limitations, as to a note payable "24 months after demand," in *Thorpe v. Booth*, 1 R. and M. 388, it being held, in that case, that the limitation of the note runs only from the lapse of 24 months after demand made. But this case is different from that of a bill payable *immediately* on demand.

“exigible” till presentment (*a*); and if days of grace are allowed on such bills or notes, the six years cannot begin till the last day of grace, as in bills or notes payable at a fixed term. This rule undoubtedly applies to bills or notes payable at a certain time after sight or presentment. ‘Where acceptance is refused, it has been decided in England—and the principle seems applicable in Scotland—that the statute of limitations runs from the date of the refusal, since the cause of action then arises (*b*).’

2. *Interruption of Prescription.*

Interruption
must be by
diligence or
action.

The Act 12 Geo. III. c. 72, provides, that, to preserve the efficacy of a bill or note, diligence must be “raised and executed, or action commenced thereon,” within the period of six years, as already explained. Nothing but diligence or action will be sufficient. For instance, it does not interrupt prescription, that on an application by the alleged creditor to the trustees of the alleged debtor, he writes a letter with a state of his claim, which is unnoticed till the years of prescription have elapsed (*c*). ‘Nor does it interrupt prescription that the holder of the bill has acceded to a private trust-disposition for behoof of creditors, though he may have forborne, in consequence of it, to take active proceedings (*d*). A notion at one time prevailed, that the sexennial prescription was interrupted by the death of the creditor (*e*). The grounds on which this was held applied equally to the triennial, and it has now been held with regard to it that the creditor’s death does not interrupt (*f*).’

Interruption
by diligence.

Diligence, to be effectual as an interruption, must be complete. It will not therefore be enough to raise letters of horning, without giving a charge on them. It has been decided, that letters of horning without a charge, though a suspension was raised *by the debtor*,

(*a*) So decided in England with reference to the statute of limitations, *Holmes v. Kerrison*, 1810, 2 Taunt. 823.

(*b*) *Whitehead v. Walker*, Ex. 1842, 9 M. and W. 506.

(*c*) *Ewing v. Cumine*, 12 Nov. 1835, 14 S. 1.

(*d*) *Blair v. Horn*, 30 Nov. 1858, 21 D. 45.

(*e*) *Boag v. Fisher*, 17 Jan. 1849, 11 D. 361.

(*f*) *Cullen v. Smeal*, 12 July 1853, 15 D. 868, overruling *Auld v. Aikmann*, 7 July 1842, 4 D. 1487.

did not interrupt prescription of a holograph bond (*a*); and the same rule appears to be deducible from the words of the statute as to bills and notes. It has been also held (*b*), that the registration of a protest, not followed by diligence, did not interrupt prescription. There was not here diligence “raised and executed;” the registration was merely a preliminary step to diligence; and though it is declared by statute to form the ground of diligence, as if it had been a decree of registration, yet it is not therefore equivalent to a decree in an action, but has merely the special effect conferred on it by statute. Any diligence, whether by horning or by arrestment, poinding, or inhibition, appears sufficient to interrupt prescription, since the statute refers generally to any diligence “raised and executed.” The production of an extract from the register of hornings, with a caption, has been held sufficient evidence of the execution of diligence for this purpose (*c*). A charge on a precept issued by a Sheriff on the protest registered in his own court, is sufficient interruption (*d*). So is a charge given on a registered protest, though followed by no further steps till after the six years, when another charge was given on new diligence (*e*).

The action necessary to interrupt prescription must be raised by the creditor. A suspension, by the debtor, of a horning raised but not executed by the creditor, will create no interruption (*f*). It is enough that action has been “commenced.” When the process has been called in Court, the claim will in future be liable to no prescription, but the long prescription of forty years. An action cannot be held as “commenced,” in terms of the Act, unless both the summons and execution are complete. It has been therefore decided (*g*), that a summons on a bill was not effectual to interrupt prescription, when the execution of it was not subscribed by the witnesses, in terms of the Act 1686, c. 4. The summons, too, must refer specially to the bill or note, it being required that action shall

Interruption
by action.

(*a*) *Wright v. Wright*, 11 Dec. 1717, M. 11268.

(*b*) *Douglas, Heron, and Co. v. Richardson*, 26 Nov. 1784, M. 11127.

(*c*) *Thomson v. Easton*, 17 June 1831, 9 S. 759.

(*d*) *Henderson v. Stewart*, 14 Dec. 1830, 9 S. 180.

(*e*) *Fraser v. Urquhart*, 11 June 1831, 9 S. 723.

(*f*) *Wright v. Wright*, note (*a*); *Scott v. Brown*, 12 Dec. 1828, 7 S. 192.

(*g*) *Baillie v. Doig*, 2 Mar. 1790, M. 11286.

be commenced “thereon ;” and therefore it has been held (a), that a citation on a blank admiral precept cannot interrupt prescription. As the bill or note is supposed still to subsist, the summons, in such a case, ought to be libelled on it, and not merely on the debt contained in it. ‘Under the triennial prescription, it has been held that the raising of an action which was afterwards abandoned (b), or the raising of an incompetent action (c), did not interrupt. If the action be competent, however, merely allowing it to fall asleep will not destroy its effect as an interruption (d).’

Decree must
be at creditor's
instance.

Any decree, to be an effectual interruption, must be obtained by the creditor in the bill or note. Thus, although the debtor in certain bills brought an action against his son, who had been taken bound to relieve him from them, and obtained decree of relief within the years of prescription, this decree was found of no avail to the creditor's representative in an action by him against the original debtor's grandson, to interrupt prescription, although the creditor, along with other creditors whose claims were the subject of the action of relief, had produced the bills in that action, and deponed to the verity of their debts (e). The decree of relief was held to be *res inter alios acta*, of which the creditor, being no party to the action, could not avail himself. It was also held that the decree, being merely for relief, could not imply the subsistence of the debt during the six years; since the primary debtor, who sued for relief, might have afterwards paid the bills, and the process of relief would have been necessary, though he had paid them before it was raised.

Production in
multiplepoint-
ing, or rank-
ing and sale.

In order to commence action to the effect of interrupting prescription, it is not necessary that the holder should raise a separate action on the bill or note, provided he makes a judicial demand on which decree can be competently pronounced in his favour, though in a process brought for his benefit in common with other creditors. It has therefore been decided, that prescription on a bill is interrupted by production of the bill and registered protest in a process

(a) *Gordon v. Bogle*, 23 June 1784, M. 11127.

(b) *Gobbi v. Lazzaroni*, 19 Mar. 1859, 21 D. 801. See opinions to the same effect under the Sexennial Act, in *Denovan v. Cairns*, *infra*.

(c) *Cochran v. Prentice*, 24 Nov. 1841, 4 D. 76.

(d) *Denovan v. Cairns*, 1 Feb. 1845, 7 D. 378.

(e) *Arbuthnot v. Douglas*, 3 March 1795, Morr. 11133.

for ranking and sale of the debtor's estate (*a*). A claim made in a multiplepointing brought for distribution of the debtor's funds, or generally "in any other process of competition" (*b*), would seem to be equally effectual.

It is said to have been decided in two cases by Lords Ordinary (*c*), that pleading compensation on a bill or note, being equivalent to an action on them, interrupted prescription. 'A few years ago the point came before the First Division, and it was held that the founding on a bill by way of compensation was sufficient interruption to the limited effect of entitling the defender to maintain that defence (*d*). But the mere production of the bill in the defence, with nothing more than a statement that the defender reserved his claim for it, does not interrupt to the effect of authorizing him to raise a separate action for it, after the period of prescription has run (*e*).'

Production in
defence.

'The Bankruptcy Act of 1856 provides, that "the presenting of or concurring in a petition for sequestration, or the lodging of a claim in the hands of the trustee, or the Sheriff, or preses at any meeting of creditors, shall interrupt prescription of the debt of the creditor so petitioning, concurring, or claiming, and in regard to such debt, shall bar the effect of any statute of limitations in England or Ireland, or other her Majesty's dominions; and although this sequestration shall be recalled, such interruption or bar shall, notwithstanding, be effectual." In order to obtain the benefit of this enactment, its conditions must of course be observed. In a case under a former Bankruptcy Act, which did not mention the preses of a meeting of creditors as a person with whom a claim might be lodged, it was held that the lodging of a bill with him did not interrupt (*f*).'

Production in
sequestration.

It would appear to have been held, in one case, that legal pro-

Does foreign
action inter-
rupt?

(*a*) *Douglas, Heron, and Co. v. Richardson*, 26 Nov. 1784, M. 11127.

Lord Corehouse, and in another by Lord Cockburn.

(*b*) 1 Bell, 393. It was so decided as to a multiplepointing in *Lindsay v. Earl of Buchan*, 17 Feb. 1854, 16 D. 601.

(*d*) *Ross v. Robertson*, 28 July 1855, 17 D. 1144.

(*c*) These decisions, as I am informed, were given in one case by

(*e*) *Eddie v. Monklands Railway Co.*, 5 July 1855, 17 D. 1041. The case arose on the Triennial Act.

(*f*) *Crawfurd's Trs. v. Haig*, 26 May 1827, 5 S. 705.

ceedings commenced on a bill in England did not interrupt prescription. But the grounds of judgment on that point are stated (a). 'The point arose in a subsequent case, when opinions were given that an English decree would interrupt; but the point did not arise purely; and there are other grounds on which the decision in the case may be rested (b). A like opinion was expressed by Lord Brougham. There appears, however, no reason in the view given by the French lawyers, who were consulted in the case his Lordship was then deciding, that when a foreign decree has been obtained, the action, after the years of prescription, should be brought on it, and not upon the bill (c).

Effect of interruption.

A decree competently obtained within the years of prescription against one of the acceptors in a bill, interrupts prescription against all of them; as it implies that action has been "commenced" in terms of the statute, which does not distinguish between its commencement against one of the parties, or against the whole. 'Nor does the statute discriminate between the effect of the commencement of the action and the effect of obtaining a decree. It has accordingly been held (illustrating both of the preceding positions), that the making of a claim in a multiple-poining against a partner interrupted prescription, so as to entitle the holder to an action against another partner (e). In the same way, interruption against two of certain heirs-portioners interrupted prescription against the remainder of them who were liable on the same grounds (f). It has also been held, that interruption against an indorser (g), or against the acceptor (h), was interruption against the drawer. From the preceding cases it is plain that it is held that the effect of interruption is not merely to entitle the holder to a complete action or diligence which he has begun, but to entitle him to go on (very much as if there were no prescription at all), and

(a) *Hunter v. Duff's Trustees*, 9 June 1831, 9 S. 703.

(b) *Roy v. Campbell*, 14 June 1850, 12 D. 1028.

(c) *Dow v. Lippmann*, 26 May 1837, 2 S. and M'L. Ap. 744.

(d) This point was decided in *Gordon v. Boyle*, 23 June 1784, M. 11127. Vide also *Soutar v. Soutar*, 29 June

1827, F. C., and 5 S. 876, as to diligence.

(e) *National Bank v. Hope*, 3 Feb. 1837, 16 S. 177.

(f) *Paxton v. Foster*, 13 July 1842, 4 D. 1515.

(g) *M'Lachlan v. Thomson*, 1 June 1831, 9 S. 753.

(h) *Roy v. Campbell*, 14 June 1850, 12 D. 1028.

to raise other actions, or diligence (a), wherever he is not prevented from doing so by the plea of *lis alibi pendens* (b).'

3. *Effect of Prescription.*

When no diligence is raised and executed, or action commenced, within six years on a bill or note, it then ceases to be "of force, or effectual to produce any diligence or action." An action may indeed be brought, after expiry of the six years, for the debt, and be made good in the manner to be afterwards explained. But a decree obtained in absence in an action for the bill will afford no ground for diligence, either against the debtor's estate or his person; and a charge given on it will be suspended without caution or consignment (c). An adjudication brought on a bill, after lapse of the six years, and taken without any previous decree constituting the debt, has been reduced as inept (d). Nor can prescribed bills produced in a ranking and sale at the instance of the debtor's apparent heir be constituted by the heir's oath, so as to entitle them to be ranked (e). But a decree in absence, produced in a ranking and sale of the debtor's estate, has been held to afford good *prima facie* evidence in a question with the common agent, when the debtor does not object; for the plea of prescription is personal to him; and if he does not challenge the decree, he may be presumed to forbear, from knowing that the debt can be proved by his oath (f).

Effect of prescription.

(a) *Main v. Wilson*, 15 April 1839, 1 D. 722.

(b) The cases cited in the foregoing article have been stated as the author found them, or as they have been added to the books since his time. Had the matter been open, the editor would respectfully have ventured to submit that the meaning of the Sexennial Act was, that no action or diligence should be respectively commenced or executed *on the bill* after the expiry of the prescribed period,—leaving all proceedings in progress before that time to be concluded in the ordinary way; and that after that time the holder should, in no circumstances, have any other power than that of con-

cluding such previous proceedings, or of raising an action *for the debt*, in which his proof should be limited to writ or oath; that there was no exception except the statutory exception of minority, and no interruption except the statutory interruption of the Bankruptcy Act; and that it was not desirable to control to any further extent the wholesome provisions of the statute.

(c) 1 Bell, 394; *M'Nicoll v. M'Neill*, 29 Nov. 1821, 1 S. 175.

(d) *Scott v. Brown*, 12 Dec. 1828, 7 S. 192.

(e) *Little v. Graham*, 4 Feb. 1826, 4 S. 424.

(f) This point is said to have been

The same principle seems to have been applied (*a*), where a party being bound by a separate letter for payment of a bill, which had undergone the sexennial prescription, but on which decree in absence had, notwithstanding, been obtained against the two acceptors, the guarantee was found not entitled to plead that the bill, which was the principal obligation, was extinguished, and that therefore his accessory obligation was also extinguished. The decree in absence was probably held, for the reason stated in the preceding case, to be *prima facie* evidence of the subsistence of the debt. But, though such a decree may preclude a party bound for the debt, by a separate obligation, from pleading its extinction, it cannot constitute the debt against obligants who are not parties to the decree (*b*).

SECTION II.

ACTION FOR THE DEBT NOTWITHSTANDING PRESCRIPTION.

Action for debt constituted by separate obligation or transaction.

Although the bill or note becomes ineffectual, by lapse of the six years, the debt is not extinguished, if the claim for which it is granted has been constituted, either before or after the date of the bill or note, by a separate obligation, which would have afforded distinct ground of action or diligence. That obligation will remain, without reference to the bill or note, unless there is reason to believe that this document was taken as a substitute for it. Thus (*c*), where the debtor in a bill, at the time of granting it, likewise subscribed a docketed account distinct from it, in which he admitted the debt, the Court sustained action for the debt, although the bill was prescribed. In another case (*d*), where a bill had been granted for payment of a sum previously due under a clause of warrandice in a conveyance of lands, as confirmed by a decree-arbitral, the Court, holding that the original obligation subsisted, gave effect to

thus decided in the case of *Black v. Shand's Creditors*, 16 Jan. 1823, 2 S. 118.

(*a*) *Howison v. Howison*, 7 Dec. 1784, M. 11030.

(*b*) See further, a paragraph on the

nature of prescription, at the end of the Section before this.

(*c*) *Campbell v. Campbell*, 19 May 1797, M. 1648.

(*d*) *Sinclair v. Sinclair*, 19 Dec.

1823, 2 S. 600.

an action brought upon it, although the bill was prescribed. And in a case (a), where the holder of a promissory-note was also heir of entail to the granter of it, under a deed which gave him (the holder) power to burden the entailed estate with the debts due by the entailer at his death, and the note in question was an unprescribed debt of his at his death, though prescribed before the date of the action, the Court decided that he was entitled, after the years of prescription, to burden the entailed estate with it, under the power given to him, the executrix of the granter admitting, by letter, that she had not paid it. The debt being unprescribed at the granter's death, it was held that the deed in question gave the holder an unlimited power to keep it up against the estate. In a later case (b), where the holder of a bill, then unprescribed, acceded to a trust-deed for creditors, in which the debt was narrated, and it was recognised by letters and various acts of the trustees, as well as in a reconveyance to the truster's heir, after his death, it was decided, that neither the intervening prescription of the bill, nor the fact of its having been written on a wrong stamp, could be pleaded against the debt. 'On the same grounds, if an assignation have been granted in further security of a bill or note, the creditor has his remedy under it, though the bill or note should prescribe (c). Again, where the debt can be proved on an entirely separate transaction from the bill, as where it arises on a sale, it may be proved irrespective of the Sexennial Act; and the fact of a bill having been granted for the transaction, and then allowed to prescribe, is not held to limit the nature of the proof (d).

'Where the debt arises on a separate transaction, or has been reconstituted by a separate obligation, the action must be laid on such transaction or obligation, and not on the bill (e).'

The statute provides a mode of proving the debt in any bill or note, even after the years of prescription. To understand the enactment on this subject, it must be compared with the enactment which precedes it. That enactment bears, that unless diligence or

Action for the debt in the bill.

(a) *Strathallan v. Drummond*, 29 May 1828, 6 S. 881.

(b) *Ettles v. Robertson*, 15 Feb. 1833, 11 S. 397.

(c) *Blake v. Turner*, 15 Nov. 1860, 23 D. 15.

(d) *Hunter v. Thomson*, 29 June 1843, 5 D. 1285.

(e) *Stirling v. Lang*, 4 Mar. 1830, 8 S. 638; *per Wood*, *Blair v. Horn*, 30 Nov. 1858, 21 D. 45.

action is brought within six years, as already explained, the bill or note shall be no longer "of force, or effectual to produce diligence or action." But it is thereafter provided, "that it shall and may be lawful and competent, at any time after the expiration of the six years, to prove the debts contained in the said bills and promissory-notes, and that *the same are resting owing*, by the oaths or writs of the debtor." These enactments were not meant to interfere with any distinct obligation which the creditor might have for the debt contained in the bill or note. But when there is no such obligation, the statute establishes a presumption, from the mere lapse of six years, that the debt in the bill or note has been paid, inasmuch as it gives the creditor no means of proving the debt, but the debtor's writ or oath, not only as to its constitution, but as to its being still "*resting owing*." A failure in this last point would be fatal, though he should establish the first. During the currency of the six years, the creditor's possession of the bill or note establishes the claim against the debtor, and he must prove payment. But after the six years, the bill or note is no longer a ground of action, and leaves no presumption even of a debt, unless it is proved in the mode prescribed.

1. *Mode of libelling Action, pleading Prescription, and ordering Proof.*

How action
for such debt
libelled.

After the six years have elapsed, as there is no longer a claim for the bill or note, but only for *the debt*, it would seem that the summons ought to conclude for the debt, and that the bill or note should be libelled on only as indicative of the mode in which the debt was constituted (*a*). But there has not been much strictness in enforcing this rule (*b*). In one case (*c*), the fact of the bill being granted is narrated in the summons, and it concludes specifically, in terms of the statute, for the debt contained in the bill. On the other hand, action was sustained, after the years of prescription, under a summons which libelled solely on the bill, it

(*a*) *Vide* 1 Bell, 394.

(*b*) In *Clarkson's Trustees v. Gibson*, 8 June 1820, F. C., the Court sustained action to the effect of having

the defender's oath, though the prescribed bill had been specially libelled on.

(*c*) *M'Neill v. Blair*, p. 475, note (*a*).

being held that prescription did not annihilate the bill, but merely raised a presumption of payment (a).

It is a question, Whether, in such an action, it is necessary to adduce the debtor's writ or oath, *in all cases*, to prove resting owing, although he should admit it judicially in his pleadings? It would appear that such an admission supersedes proof. A judicial admission, indeed, though in a written pleading, can scarcely be considered as an acknowledgment by the debtor's writ, since a pleading is not properly his writ, but only the judicial record of his case. But the statute merely enacts that it "*may be lawful*" to prove the subsistence of the debt by his writ or oath, and, therefore, it does not seem to exempt this species of action from the rule applicable to all actions, viz. that the proof referred to is to be led only when necessary, and cannot be required when the defender's admission supersedes it. Formerly the defender might, indeed, refuse to make any statement, and plead the statute (b); and, although the statute 6 Geo. IV. c. 120, and the Act of Sederunt 1828, following on it, now enact, that, when a statement is made by the pursuer, and not denied by the defender, if within his knowledge, it shall be held as admitted, it may be doubted whether this enactment is not subject to an implied exception (also founded on statute, and not recalled) of such claims as, being prescribed, are declared to be provable only by writ or oath of party (c). But if the party's statement does amount to an admission, it must have the usual effect of one. This doctrine does not seem to be doubtful, although there has been some doubt regarding its application. In one case (d), the Court, holding that the defender's statement was an admission of resting owing, decerned against him without requiring his oath. This case is therefore an authority in favour of the doctrine now stated. Again (e), it was held that

If debt judicially admitted, no order for proof necessary.

(a) *Christie v. Henderson*, 19 June 1833, 11 S. 744; *Ettles v. Robertson*, 15 Feb. 1833, 11 S. 397.

(b) It has been decided, that a party is not bound to confess or deny, in terms of the Act of Sederunt, then subsisting, where his oath is the only mode of proof competent; *Dick v. Aiton*, 24 Feb. 1738, M. 12041.

(c) In *Alcock v. Easson*, *infra*, it

was held that the absence of an averment of payment was not equivalent to an admission of resting owing.

(d) *Philp v. Milne*, 15 Jan. 1800, Morr. App. to Bill, 13. *Vide* also the Lord Justice-Clerk's and Lord Glenlee's remarks on that case in *Clarkson's Trustees v. Gibson*, 8 June 1820, F. C.

(e) *Clarksons v. Gibson*, note (d).

the defender's oath was necessary, although the pursuer maintained that the statement in his pleadings amounted to an admission of "resting owing." The majority of the Court did not think that this statement amounted to such an admission, although it seems to have been held that, if it had been clearly made, the oath would have been unnecessary (*a*). This case, therefore, is not inconsistent with the general doctrine previously established. 'Recent cases, though not unattended with differences of opinion on the Bench, have confirmed the doctrine. In two cases in the Second Division, one on the Triennial (*b*), and the other on the Sexennial Act (*c*), it was laid down, that where the admission was clear, and free from qualification, it superseded a reference to oath; and in a subsequent case, on the sexennial prescription (*d*), in the First Division, the majority of the judges took the same view. These cases establish also that the defender's statement must be taken with all its qualifications, and does not afford materials for decree, unless it simply admits the debt (*e*). Previous cases (*f*), therefore, in which the Court had allowed the pursuer to take advantage of an admission, and yet reject a qualification, must be regarded as overruled. The result of the recent cases is, that if the defender simply admits the debt, there is nothing to go to proof, and therefore no necessity for any order to prove; but that if he admits it under qualifications, the pursuer must either take the admission as he finds it, or go on to prove his case, without reference to the admission (*g*). This doctrine, it will be seen, reduces the effect of a judicial admission to the narrowest limits, as there are few or no cases in which a defender unqualifiedly admits a debt.

(*a*) *Vide* opinions of Lords Craigie and Glenlee in this case.

(*b*) *Alcock v. Easson*, 20 Dec. 1842, 5 D. 356. This case contains a valuable commentary by Lord Justice-Clerk Hope on the previous cases.

(*c*) *Noble v. Scott*, 23 Feb. 1843, 5 D. 723.

(*d*) *Darnley v. Kirkwood*, 6 Mar. 1845, 7 D. 595.

(*e*) See, in further support of this rule, *Campbell v. Macartney*, 23 June 1843, 4 D. 1086; *Galloway v. Moffat*, 18 July 1845, 7 D. 1088; *Milne*

v. Donaldson, 10 June 1852, 14 S. 848.

(*f*) *Mitchell v. Ferrier*, 23 Dec. 1842, 5 D. 169; *Murray v. Elliot*, 14 June 1837, 15 S. 1141. See Lord Justice-Clerk Hope's observations in *Campbell v. Grierson*, 15 Jan. 1843, 10 D. 361, a case under the quinquennial prescription.

(*g*) In *Webster v. M'Lellan*, 2 July 1852, 14 D. 932 (under the Triennial Act), an opinion was given, that such admissions could not even be used to help out a proof by writ, where such proof was necessary.

‘Where an action for the debt is defended, the defender usually pleads prescription. It would appear that if he failed to plead it, he would not receive the benefit of it (a). Formerly, when prescription was pleaded, there was a good deal of confusion in the mode of proceeding, and though the plea regulated nothing but the mode of proof, a proof was frequently allowed without either sustaining or repelling it; and then at the conclusion of the proof, if the debt was established, the plea of prescription was repelled along with the other defences. The form of proceeding now adopted is more satisfactory. The plea of prescription must be disposed of in one way or other as soon as the record is closed (b). The appearance of the bill, with the statements on record, is generally sufficient to determine whether it is prescribed or not. If insufficient, and proof is required, it should in the first place be limited to that point alone (c). When it has been determined whether the plea of prescription applies, the farther procedure to be taken is also determined. If the bill is not prescribed, the plea is repelled, and it is then for the defender to rebut the presumptions which an unprescribed bill raises against him. If the bill is prescribed, then the plea of prescription is sustained; and it is for the pursuer to prove the constitution and resting owing of the debt, by the writ or oath of the defender. Accordingly, in all cases except in those in which the pursuer has already produced writs of the debtor, sufficient to prove the debt, an order for proof is pronounced; and this order may either be an order in the first place for proof by writ (d), leaving it open for the pursuer afterwards to lead his evidence by oath under a reference; or it may be, if the defender has proved constitution by admission or writ, an order for proof of resting owing by oath (e); or it may be an order for both kinds of proof at once (f). The latter form of order seems in many cases the preferable, because under it the pursuer, in the first

But if the debt is denied, or not admitted, then there is an order for proof.

Form of this order.

(a) This follows from the statutes requiring the defender to state his pleas in law. In England the statute of limitations must be pleaded; *Gould v. Johnson*, 1702, 2 Ld. Raym. 838; Chitty, 386.

(b) *Alcock v. Easson*, *ut supra*.

(c) Such proof might be required, where it was disputed, for example,

whether a claim had been made on the bill under a sequestration.

(d) *Blair v. Horn*, 30 Nov. 1858, 21 D. 51.

(e) *Deans v. Steele*, 24 Dec. 1853, 16 D. 317.

(f) This form is understood to be in general use in the Sheriff Courts.

place, recovers all the admissible writings which he can ; and then, in the next place, examines the defender on oath. In this way the pursuer's whole proof is led at one stage, and the case made ripe for judgment after one discussion.

2. *What must be proved.*

‘ Under the order for proof, the pursuer must prove two things ; namely, the constitution, and the resting owing, of the debt (a).’

Constitution.

‘ The holder must, firstly, prove the constitution of the debt. He does not do this by merely proving that the defender signed the bill, for the signature may have been obtained to the bill, without there having been previously in existence, or then created, any debt legally exigible (b). Thus, if it appear that the bill was granted for a debt arising on an illegal transaction, the pursuer will fail (c). And he will fail, where the only evidence admissible establishes that the defender signed the bill believing it to be a receipt (d), or signed the bill for one purpose while the holder fraudulently applied it to another (e).’

Case of accommodation-bill.

A question has arisen, Whether a person admitting that he accepted a prescribed bill, but stating that he had done so for another person's accommodation, without receiving value, is thereupon bound for the debt ? In one case (f), of an action by the onerous indorsee of a prescribed bill against the acceptor, the latter having admitted his acceptance, which admission was held equal to his oath, and not stating that the bill was paid, but merely that he had accepted it without value for the drawer's accommodation, the Court, holding that the bill was unpaid, and that the want of value was no defence against an onerous indorsee, decerned for payment. The defender here virtually admitted that the money, though not paid to him, was advanced on the faith of his acceptance, and that thus he became bound for it as money had and received to his use.

(a) *Drummond v. Crichton*, 12 Jan. 1848, 10 D. 340.

(b) *Drummond v. Crichton*, *ut supra*.

(c) *Clarkson's Trustees v. Gibson*, 8 June 1820, F. C. ; *Campbell v. Scotland*, 28 Nov. 1778, M. 9530 ; *M'Neill v.*

M'Kissock, 28 Feb. 1805, F. C. ; *Dickson on Evidence*, § 445.

(d) *Agnew v. M'Rae*, 1782, M. 13219 ; *Fraser*, 27 June 1809, F. C.

(e) *Drummond v. Crichton*, *ut supra*.

(f) *Philp v. Milne*, 15 Jan. 1800, *Morr. App. to Bill*, 13.

It was therefore as much his debt as if he had first received the money, and then delivered it to the party accommodated. The same question has been since more deliberately considered in two other cases, in both of which the party sued having deponed to facts which proved that the amount of the bill had been advanced to the other party on the faith of his obligation, and both parties admitting that they had not paid the debt, the Court, though by the narrowest majority, decided against the defender (*a*). The principle thus established, of the liability of an accommodation-acceptor on a prescribed bill, when he admits that its amount has been advanced on the faith of his obligation, has been since recognised in several other cases (*b*). But in another case (*c*), where one of two joint obligants in a prescribed promissory-note admitted on oath that he had signed it, but deponed that the holder had stated, at the time, that it would never form a debt against him, he was absolved in respect of his oath. 'This case is distinguished from the others by the circumstance, that the bill was not in the hands of an indorsee. When the bill is in such hands, it is useless for an acceptor to depone that *he* got no value, if another person did on the faith of his subscription. This was recently held in a case on a bill which the acceptor had signed in order to renew a previous accommodation-bill in favour of another to which he had been a party (*d*).'

In one of these cases above referred to (*e*), the Court remitted to the Lord Ordinary to hear parties on the question how far the defender's obligation, as that of a cautioner, fell under the septennial prescription enacted by the statute 1695, c. 5, as to cautionary obligations. The argument on this point was stopped by an appeal; but the same point has been since discussed before the same Lord Ordinary in another case (*f*), and the prescription has been found inapplicable. A similar decision had been previously

Does the septennial prescription apply in this case?

(*a*) *M'Neill v. Blair*, 21 Jan. 1825, 3 S. 459; *Laidlaw v. Hamilton*, 31 May 1826, 4 S. and D. 636. The first of these cases, after an appeal had been entered, was compromised.

(*b*) *Wilson v. Strang*, 3 Mar. 1830, 8 S. 625; and *Christie v. Henderson*, 19 June 1833, 11 S. 744.

(*c*) *Baird v. Little's Trustees*, 21 June 1827, 5 S. 820.

(*d*) *Boyd v. Fraser*, 28 Jan. 1852, 15 D. 342.

(*e*) *M'Neill v. Blair*, note (*a*).

(*f*) *M'Indoe v. Frame*, 18 Nov. 1824, 3 S. 295.

given in the case of a party accepting a bill which was addressed to another party as principal, and to him "as security, jointly and severally," and who was found not entitled to plead the septennial prescription against the holder (*a*).

Resting owing.

Whether the pursuer's claim rests on the defender's admission, or on his oath, one or other must afford complete evidence of resting owing, since the statute throws the whole burden of proving that fact on him. The debtor's oath will not avail the creditor, unless he either depones expressly that the debt is resting owing, or states facts which lead necessarily to that conclusion. The debtor's writ, likewise, in order to have the effect required by statute, must instruct that the debt is "resting owing." On this ground it may be doubted whether there was reason for holding, in a previous case (*b*), that the defender's statement established the claim; as it merely imported that the defender had signed the bill as acceptor for the accommodation of another party, and not that it was still unpaid, but without saying anything on that subject, referred generally to the plea of prescription. In another case, already noticed (*c*), the defender admitted on oath that he had not paid the bill. In a previous case (*d*), where the defender, though he admitted the granting of the bills (stating, however, that they were granted without value, and were struck at by the Bankrupt Act, 33 Geo. III. c. 74), did not admit that they had not been paid, but pleaded prescription, and that the pursuer was bound to prove resting owing by his writ or oath, the Court were not satisfied with a *presumption* of non-payment, but held that the pursuer must prove it; and thereafter found that the defender's oath was necessary. In an earlier case (*e*), where the defender's judicial statement was received, both by the parties and the Court, as equivalent to his oath, the fact of non-payment was implied in his statement. In a later case (*f*), where an action was brought for the balance

(*a*) *Sharp v. Hervey*, 24 June 1808, *Morr. App. v. Bill*, 28. In *Boyd v. Fraser*, *ut supra*, a plea that an accommodation-acceptor was freed (as being a cautioner) under the Act 1695, c. 5, was abandoned in the Outer House.

(*b*) *Philp v. Milne*, *ante*, p. 471, note (*f*).

(*c*) *M'Neill and Others v. Blair*, p. 475, note (*a*).

(*d*) *Clarkson v. Gibson's Trustees*, p. 474, note (*c*).

(*e*) *Robertson v. Clarkson*, 19 Nov. 1784, M. 13244.

(*f*) *Robertson v. Thomson*, 26 May 1830, 8 S. 810.

of a prescribed bill, eleven years after it became due, and the defender, on a reference to his oath, deponed that he had paid this balance to the eldest son (the mother and younger children being in right to the note), but without direct proof of authority from them to the son to receive it, though the authority was held to be presumable from their subsequent taciturnity, both as to principal and interest, contrasted with their previous urgency for payment, the Court decided that resting owing was not proved. 'Where the proof is by writ, the rule is equally applicable. The debtor's books are his writ; but the inference to be drawn from their containing an entry of the constitution of the debt, and no entry of its payment, though not doubtful, does not afford the distinct proof of resting owing required by the statute (a).' The result of these decisions appears to be, that non-payment must be either directly admitted, or proved by writ or oath (b).

3. *Whose Evidence to be taken.*

'In general, the pursuer must prove by the writ or oath of the debtor in the bill, but there are certain situations in which he may be deprived of that evidence; and questions have arisen if there may not be situations in which he may be entitled to use the evidence of one party against another.'

In a ranking and sale of a deceased debtor's estate, brought by his eldest son and heir, where a claim was made for creditors on certain bills and open accounts which were prescribed, it was found incompetent to refer them (viz. their contraction as well as their subsistence) to the oath of the heir, who had been a pupil when they were contracted, and was still a minor (c). But, in another case (d), the Court sustained a reference to the oath of certain trustees as to resting owing on a prescribed bill by the deceased truster, reserving, however, all questions as to the effect of their oath, and excluding one of the trustees who had allowed decree

Evidence of

Heir;

Trustee, or
Executor;

(a) *Ellis v. White*, 12 July 1849, 11 D. 1347.

(b) See *infra*, p. 480, for further information as to the case of one of several obligants deponing that he has

not paid, and does not know if the others have.

(c) *Little v. Graham*, 4 Feb. 1826, 4 S. 424.

(d) *Murray v. Laurie's Trustees*, 2 Mar. 1827, 5 S. 515.

against him as a joint acceptor of the bill, on the ground that he had an interest to be relieved to the extent of one-half of it. On the other hand, it has been decided (*a*), that the insertion of a bill by curators to the debit of their accounts, cannot preclude them or the minor from afterwards pleading prescription against the debt. 'Where the debtor has died, the creditor has lost the power of referring the matter to his oath. No doubt he has, in place of it, the power of referring to the oath of the debtor's representatives, but they may know nothing about it; and in the event of their deponing to that effect, the result simply is, that the creditor has not proved his case (*b*). Where the executors or trustees admit the debt, by writ or oath, that of course is conclusive in a question between the creditors and themselves, as far as concerns their own interest in the trust (*c*); but if there are other parties interested, for example competing creditors, it is doubtful if the evidence be complete against them. In one case in which such a question arose, three of the judges were of opinion that it was binding on them, and two that it was not. The point, however, was not decided (*d*).

Agent;

'The general rule is, that an agent, with a general authority, cannot give a written admission sufficient to prove the case against his principal after prescription (*e*). But there may be special circumstances in which the agent's writ may be binding. Thus, where certain trustees signed a bill, and then left the entire management of it to an agent, from whose books they were perfectly aware that he was paying the interest of the debt after the bill had prescribed, it was held that markings of the payments of this interest in his handwriting on the bill formed their writ, and bound them (*f*). And where an executrix had empowered an agent to act for her on all matters connected with the deceased, and he made payments to account before, and acknowledged the debt after prescription, she

(*a*) *M'Nicoll v. M'Neill*, 29 Nov. 1821, 1 S. 175.

(*b*) *Stirling v. Henderson*, 11 Mar. 1817, F. C.

(*c*) *M'Tavish v. Saltoun*, 25 Jan. 1825, 3 S. 172. In the case of bill due to the trust, it was held that the acceptor could not refer its non-onerosity to one of a number of trustees.

Forsyth's Trs. v. M'Lean, 18 Jan. 1854, 16 D. 343.

(*d*) *Wood v. Howden*, 7 Feb. 1843, 5 D. 507.

(*e*) *Ferguson v. Bethune*, 7 Mar. 1811, F. C.

(*f*) *Campbell v. Ballantyne*, 21 Dec. 1839, 1 D. 1061. As to entries in books by factor or clerk, see p. 483.

was held bound (*a*). There does not appear to be any authority for supposing that the oath of an agent could be taken against a principal, in any circumstances, even where the agent had granted a bill *per* procuration.

‘A husband being liable for his wife’s bills after marriage, it would seem that his writ would be sufficient in any question with him or his representatives (*b*). It is very doubtful if it would be sufficient against the wife after a dissolution of the marriage. While the marriage subsists, it would seem incompetent to prove a debt (not within the *prepositura*) against the husband by the wife’s writ or oath, granted or emitted during coverture (*c*).’

Husband or
wife ;

It is probable that the oath of a bankrupt debtor in a prescribed bill would be admitted to establish the debt against his creditors. This was allowed in one case (*d*) ; ‘and though it has been decided that a reference to the oath of a bankrupt is in the ordinary case incompetent (*e*), it does not seem to have been intended to make this applicable to the case of prescription. If the creditors take advantage of one part of the statute to cut off the debt, it seems to have been thought reasonable that the creditor should be allowed the advantage of the other part of the statute to prove it (*f*). In England, if the bankrupt waives the statute of limitations, the creditors cannot plead it (*g*).’

Bankrupt ;

‘Where prescription, pleaded by a company in an action against them, has been sustained, it does not seem to have been clearly determined to whom the reference to oath is to be made. It is of course competent to refer to the oaths of all the partners ; but where such a reference is made, it must be exhausted by all their depositions being taken (*h*). This makes it desirable to know whether a more limited reference may not be made. It has been decided, that where the partners have delegated the entire management of the company affairs to one of their number, it is enough to

Partners.

(*a*) *M’Gregor v. M’Gregor*, 27 June 1860, 22 D. 1264.

(*b*) *Barclay v. Alexander*, 26 Feb. 1846, 8 D. 549.

(*c*) *Morris v. Monro*, 2 Dec. 1829, 8 S. 156 ; *Monro v. M’Leod*, 10 Feb. 1809, H. 215 ; 1 *Fraser’s Personal and Domestic Relations*, 295.

(*d*) *Buchan v. Barclay*, 31 Jan. 1787, M. 11128.

(*e*) *Thomson v. Duncan*, 10 July 1855, 17 D. 1081.

(*f*) *Per Hope in Adam v. MacLachlan*, 20 Jan. 1847, 9 D. 560.

(*g*) Chitty, p. 386.

(*h*) *Cleland v. M’Lellan*, 22 Jan. 1851, 13 D. 504.

refer to his oath (*a*) ; and on the same principle it should seem that where one partner was admitted to have managed all the business connected with the particular bill, his oath alone should be taken ; and that where partners were abroad or at a distance, and could have had no share in it, their oaths need not be taken. Beyond these restrictions there seems no principle for proceeding. When the company is dissolved, it is incompetent to refer to one partner to constitute the debt against the company (*b*). The reference must be to all, and all their depositions must be read together, as forming the proof (*c*). Where one partner is sued after dissolution, it is incompetent to refer to the oath of another partner as binding him (*d*). The writ of a partner, granted during the subsistence of the company, and in circumstances where he was entitled to act for it, would seem to bind all the partners, even in actions brought against them after dissolution (*e*).'

Writ or oath of one obligant does not bind another.

As the Scotch statute excludes action or diligence on the bill or note after the six years, and merely allows the creditor to prove the debt by the debtor's writ or oath, it follows, that only the debtor whose writ or oath is obtained can be thereby bound ; and, therefore, that neither the writ nor oath of one party to a bill or note can prove the debt against other parties (*f*). Accordingly, it was held (*g*), that markings of interest made after the six years, on a bill by one of three joint acceptors, and a letter by him admitting that the bill was unpaid, could neither of them prove resting owing against another acceptor. It was also held in that case, that the circumstance of a dividend having been drawn, after the six years, from the bankrupt estate of one of the acceptors, could have no effect against the others. The ranking for such a dividend could not be more available than a decree obtained after the six years against one acceptor, which has no effect against another acceptor. It has

(*a*) *Gow v. M'Donald*, 27 Feb. 1827, 5 S. 472 ; *Dickson on Evidence*, § 1573.

(*b*) *M'Nab v. Lockhart*, 10 Mar. 1843, 5 D. 1014.

(*c*) *Broom v. Edgley*, 31 May 1843, 5 D. 1087.

(*d*) *Neill v. Campbell*, 7 Mar. 1849, 11 D. 979 ; *Easton v. Johnston*, 15 Feb. 1831, 9 S. 440.

(*e*) 2 Bell's Comm. 618 ; *Nisbet's Tr. v. Morison's Tr.*, 23 Jan. 1829, 7 S. 307 ; *Treacher v. Galloway*, 19 Nov. 1844, 17 Scot. Jurist, 55.

(*f*) *Allan v. Ormiston*, 30 Nov. 1817, H. 477.

(*g*) *Houston v. Yuill*, 31 May 1822, 1 S. 449, and 4 S. 24.

been since decided (*a*), that an acknowledgment of resting owing made by one acceptor after the six years cannot bind his co-acceptor; and (*b*) the same decision was given as to a marking of interest made on a bill by one acceptor after the six years, when pleaded against another acceptor, the Court holding the point to be settled by the previous case. A contrary doctrine is held in England; but no argument can be safely drawn from the English practice under one statute, to elucidate the construction of a different statute. 'Where a reference is made to the oath of the obligants, and one of them negatives the constitution of the debt, he is entitled to be assoilzied at once, without awaiting the issue of the reference to the others (*c*). If the oaths of all the obligants be taken, and each admits the constitution, and that he has not paid it, the debt is proved against all of them, because the depositions when read together amount to admissions of both parts of the pursuer's case (*d*). The result would be the same if some of them deponed in this manner, and the others confessed by allowing decree in absence to pass (*e*). It was at one time held, that where the reference was only to some of the obligants, and they severally admitted the constitution, and deponed that they had not paid, and did not know whether the other acceptors had paid, the debt was proved against them (*f*). Doubts have been cast on the soundness of this decision (*g*). It is not very clear, however, that it can be taken as a positive assertion of a distinct rule. It was arrived at by the narrowest majority, and one of the majority afterwards stated that he went on the special circumstances (*h*). The proof of resting owing was incomplete, so long as there was room for supposing that the other acceptor had paid the debt.'

(*a*) *M'Neill v. Blair*, 31 Jan. 1823, 2 S. 174.

(*b*) *M'Indoe v. Frame*, 18 Nov. 1824, 3 S. 295.

(*c*) *Easton v. Johnston*, 15 Feb. 1831, 9 S. 440.

(*d*) *Laidlaw v. Hamilton*, 31 May 1826, 4 S. 636; *Wilson v. Strang*, 3 Mar. 1830, 8 S. 625.

(*e*) *Boyd v. Fraser*, 28 Jan. 1853, 15 D. 342.

(*f*) *Christie v. Henderson*, 19 June 1833, 11 S. 744.

(*g*) See Dickson on Evidence, § 460.

(*h*) See the President's opinion in *Drummond v. Crichton*, 12 Jan. 1848, 10 D. 347.

4. *Mode of Proof—Writ.*

Writ after the
six years.

It has been found that the debt is sufficiently instructed by any written acknowledgment of the debtor subsequent to the six years, that the debt subsisted at its date; for such writing raises a new presumption against him, which he must redargue by showing that the debt has been paid. Thus (*a*), a letter written by a debtor to the creditor after the six years, requesting him “to send a copy of the bill, and the payments made on the back of it, so that he might settle the balance,” was held to support an action for payment of this balance; and a letter granted after the six years, agreeing to pay a composition on the debt, has been held to establish resting owing (*b*), or a letter referring to another debt, but acknowledging the debt in question by implication (*c*). ‘When the writing founded on admits a debt to be due, but without specifying nature or amount, it will be referred to the bill if there be no allegation of any other debt to which it could apply (*d*). If there be such an allegation, it would seem competent for the pursuer to prove the application of the writ to the debt sued for *prout de jure* (*e*).’

Markings of
interest or pay-
ments to ac-
count, after the
six years.

The same effect has been justly given to markings of interest, made *after lapse of the six years*, in the debtor’s handwriting (*f*); for these markings amount to an acknowledgment by his writ that the principal sum was due after the six years, and therefore afford evidence that it is still resting owing, unless he proves the contrary. ‘Thus, when a receipt for interest after the six years, in the creditor’s handwriting, was found in the repositories of the debtor after his death, it was held to prove the debt (*g*).’ Similar markings of partial payments to account of the principal sum, made and entered after the six years, have the same effect, as they imply an

(*a*) *Russell v. Fairie*, 23 May 1792, M. 11130,

(*b*) *Mackenzie v. Noble*, 15 Feb. 1827, 5 S. 367.

(*c*) *Elder v. Marshall*, 3 Dec. 1830, 9 S. 133.

(*d*) *Fiske v. Walpole*, 19 July 1860, 22 D. 1488.

(*e*) *Sterenson v. Kyle*, 31 May 1849, 11 D. 1086; *Wood v. Howden*, *infra*.

(*f*) In *Ferguson v. Bethune*, 7 Mar. 1811, F. C., action for the amount of certain bills was sustained, in consequence of markings of interest made on the bills in the debtor’s handwriting, and, in one case, entered in his books after the lapse of six years.

(*g*) *Wood v. Howden*, 7 Feb. 1843, 5 D. 507.

acknowledgment of the balance of the debt. Thus (a), where the representative of the original debtor in a bill had made a partial payment after the six years, and marked it on the bill with his own hand, the Court sustained action for the balance, in respect of "the partial payment of the debt in question, subsequent to the running of the sexennial prescription, and other circumstances of the case." In another case (b), already noticed, where it was decided that such markings during the currency of the six years did not interrupt prescription, it was implied that they would have established the debt, had they been dated after the six years. Such markings, however, to be effectual, must be made by the debtor, or, if he is dead, by his representative, in order to render him liable (c). Markings of interest by the debtor's factor will have no effect, although the payments to which they refer have been regularly entered in the factory accounts (d). But entries of such payments made in the debtor's books by his clerk after the six years, have been held to prove resting owing; the debtor's books, whether kept by himself, or by a person acting under him, being properly his writ (e). 'Where payments to account have competently been proved to have been made, but it is left doubtful whether they were made to account of the prescribed bill, or to account of another unprescribed debt, the presumption will be that they were made to the latter, and it would seem that this presumption cannot be rebutted by parole (f). But if there is no other debt to which the payment could apply, it will be held to apply to the bill (g).'

It seems to be now established, that, in general, no acknowledgment, whether express or implied, as by markings of interest or partial payments to account of the principal sum, can form a ground of action, when made before expiry of the six years. The creditor, after he has suffered prescription to run, is bound by the statute to *prove* that the debt is still "resting owing." But neither a direct acknowledgment by the debtor, nor the acknowledgment implied in a marking of interest or of a partial payment, when made before ex-

Acknowledgments or payments of interest or to account, made within the six years.

(a) *Scott v. Gray*, 3 Feb. 1784, M. 11126.

(b) *Russell v. Fairie*, p. 482, note (u).

(c) *Scott v. Gray*, note (a).

(d) *Ferguson v. Bethune*, 7 Mar. 1811, F. C.

(e) *Black v. Shaw's Creditors*, 16 Jan. 1823, 2 S. 118.

(f) *Cooper v. Young*, 28 Nov. 1849, 12 D. 190.

(g) *Watson v. Hunter*, 18 Feb. 1841, 3 D. 583.

piry of the six years, affords even a presumption that the debt continues "resting owing" after the six years; for although the whole or part of the principal sum were due at one period of the six years, it may have been all paid before they expired. An acknowledgment, indeed, granted the very day before they elapse, and with the evident view of establishing the debt, may be probably held, as was once found (*a*), to instruct resting owing, as much as if granted after the six years. But unless in such special circumstances, no acknowledgment during the six years can have this effect, because it does not afford that proof of "resting owing" which the creditor is required to adduce (*b*). 'Where a writing within the six years is founded on, it must be such as to amount to a reconstitution of the debt (*c*); and, as already pointed out, the action must be laid on it (*d*).'

It has been said (*e*), that such an acknowledgment, as it proves the subsistence of the debt at its date, ought to form the commencement of a new term from which prescription should run, and that this new period of prescription cannot be less than six years. But this doctrine implies a misconception of the nature of such an acknowledgment. If the acknowledgment forms a distinct obligation, then, as already shown, it is not affected by the sexennial prescription. But if it does not, it cannot prove the subsistence of the debt during the six years, because the bill is then the best proof of it, and the currency of the prescription bears reference to it alone. But when, by lapse of the six years, the bill ceases to be "of force, or effectual to produce diligence or action," the only remaining way of "making good the debt" is to prove its subsistence *at that time* by the debtor's writ or oath, and not by his acknowledgment during the six years.

Supposing that resting owing is proved by a written acknowledgment, it is a question, Whether the debt thereafter runs a new

If acknowledged after the six years, when does the debt prescribe?

(*a*) *Lindsays v. Moffats*, 19 May 1797, Morr. 11137. Professor More (Notes to Stair, p. cclxxiii.) says this decision seems of doubtful authority.

(*b*) *Horsburgh v. Bethune*, 13 Feb. 1811; *Ferguson v. Bethune*, 7 Mar. 1811, F. C.

(*c*) *Blair v. Horn*, 17 June 1859, 21 D. 1004.

(*d*) *Antea*, p. 469.

(*e*) *Vide* opinions of the majority of the Court in *Lindsays v. Moffats*, note (*a*). A similar opinion was also expressed by several of the judges in *Arbuthnot v. Douglas*, 3 Mar. 1795, M. 11133.

sexennial prescription ; or whether its duration is determined by the rules adopted before the sexennial prescription ; or, lastly, Whether it is like other personal claims, which are subject to no special prescription ? This question was raised by one of the judges in a case already cited (*a*), but there was no occasion to determine it. In another case (*b*), the Lord Ordinary refused effect to certain markings of interest holograph of the debtor, as they were made more than six years before the commencement of the action. But it does not appear whether the Court affirmed his Lordship's interlocutor on this ground, or because the markings were also dated before the six years on the bill had elapsed. In another case (*c*), however, a decision of the point seems to be implied, since the validity of the debt contained in one of several bills was there held to depend on the question, Whether a marking of interest on it in the debtor's handwriting had been made in 1802, more than six years before the commencement of the action, or in 1803, which was less than six years before that period. The marking was ultimately ascertained to have been made in 1803, and therefore the debt was sustained. But notwithstanding this decision (which was given in a case relating to a number of other bills, and involving various other points), the matter may perhaps require reconsideration. There is no question in such a case about the prescription of the bill or note ; for, as the six years of its currency are supposed to have elapsed, it is no longer a subsisting document, and it is only the *debt* contained in it which the debtor's acknowledgment is brought to prove. But the sexennial prescription is applied by the statute to the bill or note alone ; and there is no enactment in it bearing that, after the subsistence of the *debt* is proved notwithstanding this prescription, the debt likewise shall undergo a new sexennial prescription. The statute merely points out a mode by which the *debt* may be made effectual, notwithstanding prescription of the bill or note ; and if no sexennial prescription is applicable to it when thus revived, it can only be subject to the long prescription, or to the same discretionary period of presumptive payment to which bills were formerly liable. Perhaps the same grounds which led

(*a*) *Russell v. Fairie*, 23 May 1792,
M. 11130.

(*c*) *Ferguson v. Bethune*, 7 Mar.
1811, F. C.

(*b*) *Horsburgh v. Bethune*, 13 Feb.
1811, F. C.

the Court to adopt the last of these alternatives are applicable to this case. But, in another case (*a*), where a marking of interest on a bill made by one acceptor after the six years, was found to have no effect against a co-acceptor, the Court is said to have held, that, as the debt alone is revived by the debtor's acknowledgment, it does not run a new sexennial prescription, but can only be subject to the long prescription. It may be expedient that the debt should incur a sexennial prescription like the bill or note; but this can only afford reason for a new enactment.

5. *Mode of Proof—Oath.*

Reference
to oath.

'The usual mode of taking the proof by the defender's oath, in cases of prescription, is under a reference. The reference may either be specially, of the constitution and resting owing of the debt, or generally, of all the facts in the case. Where the reference is a general one it is still limited by the record (*b*), and the examination must not be extended beyond the matters disclosed on it (*c*). The proper time for making a reference to oath in questions of prescription, would seem to be before judgment on the merits, the deposition forming the whole or part of the pursuer's proof; but there would seem no reason why a reference, as in other cases, should not be allowed after judgment (*d*). After such a judgment, the reference must be accompanied by an incidental application to the Court to sustain it (*e*).'

Conduct of
the examina-
tion; special
questions.

Although the defender, when reference is made to his oath, is the pursuer's only witness, by whose evidence he must prove that the debt was constituted and is resting owing, the defender cannot confine himself to a general answer that the debt never existed or has been paid, but must, like other witnesses, answer all special interrogatories on these two points, otherwise he will be held as confessed. The same principle is applicable here which was applied in a reference to an indorsee's oath, regarding the value which

(*a*) *M'Indoe v. Frame*, 18 Nov. 1824, 3 S. 295.

(*b*) *Brown v. Moncur*, 29 June 1837, 15 S. 1230.

(*c*) *Mather v. Nisbet*, 15 Dec. 1837, 16 S. 248.

(*d*) See *Scott v. Donaldson*, *infra*.

(*e*) *Winton v. Thomson*, 10 June 1862, 24 D. 1094; *Campbell v. Campbell*, 11 July 1834, 12 S. 923; *Scott v. Donaldson*, 22 Dec. 1831, 10 S. 174.

he gave for a bill (*a*). But, in a case (*b*) where reference was made to the representative of a deceased debtor, and he deponed that he never heard of the bill, and did not know whether it was paid or not, the Court dismissed an action for the debt; for the defender could not be held as confessed, as he neither knew nor was bound to know anything regarding the bill, and, on the other hand, the pursuer had failed in his proof of resting owing. 'Where a general question of the kind which led to the evidence in the preceding case has been put, it is irregular to permit special questions to be put. These must be put in the first instance; though, if they are put afterwards, and the answers recorded, effect must be given to them (*c*). If, in the answers to the special questions, the defender admit facts inferring his liability, he will be found liable, though in an answer to a general question he should dispute it (*d*); or though more should be referred than was necessary, and he should negative the reference on other points (*e*). In conducting the examination, the defender may be called on to look at documents in process to refresh his memory (*f*), and with the same view he may be called on to look at his letter-book, and state the contents of any letters found there relating to the bill; but such letters cannot by this means be made evidence (*g*). Where the deposition is inconclusive, the defender may be re-examined (*h*).'

If a party has been regularly cited to appear in an action for the debt in a bill or note, and a reference is made to his oath, even in absence (proper notice of the reference being given to him), it would appear that, on his failing to appear and depone on the reference, he will be held as confessed, so as to exclude him from afterwards opening up the decree pronounced against him. But such a reference must be made by a regular judicial act; and a summons containing a clause of reference, followed by an ordinary decree in absence, cannot have the effect of a decree *pro confesso* (*i*). 'If

What if the defender fail to appear to depone?

(*a*) *Swan v. Swan*, 30 June 1786, M. 9418.

(*b*) *Stirling v. Henderson*, 11 Mar. 1817, F. C.

(*c*) *Hedde v. Baikie*, 16 Jan. 1841, 3 D. 370.

(*d*) *Grant v. Wishart*, 17 Jan. 1845, 7 D. 274.

(*e*) *Hedde v. Baikie*, *ut supra*.

(*f*) *Craig v. Thomson*, 12 Feb. 1842, 4 D. 668.

(*g*) *Nicol v. Low*, 17 July 1852, 14 D. 1044.

(*h*) *Anstruther v. Lewis*, 5 Mar. 1851, 13 D. 841.

(*i*) *Nicholson v. Macleod*, 23 Nov. 1810, F. C.

the pursuer, on the other hand, after referring to oath, fail to proceed with the reference in a reasonable time, the Court will circumduce and assoilzie the defender (a).'

6. *Construction of Proof—Intrinsic and Extrinsic Statements.*

Another question is, Whether, on reference to the defender's oath, he will be absolved in all cases by any statement which imports either the original nullity or extinction of the claim. Here the same distinction must be observed with regard to intrinsic and extrinsic qualities of oaths, as in other cases of reference to oath. The points referred are, 1st, The original validity of the claim; and 2dly, Whether it is resting owing; and any answer which directly meets these questions, being intrinsic to the subject of the oath, must be admitted as conclusive, without further evidence.

Statements
affecting the
constitution.

As to the constitution of the claim, it has been held intrinsic to the reference, when the defender, in an action on certain bills, deponed, that, though he accepted them, he did so by mistake, imagining them to be receipts for money advanced to him on account of a son of the drawer (b). This was a direct answer to the question, whether there was ever any debt, as it implied that there was none. The same ground of decision was followed (c), where a party, being sued for the amount of a prescribed receipt, containing also a promise to pay, and having emitted an oath, which imported that the pursuer's father, to whom this document was granted, had at first refused to take it, as he said that he owed the defender more than its amount (which statement the defender believed to refer to the value received by him for a bill (produced) previously granted by him to the defender's father), but that the defender persuaded him to take it in the meantime, till accounts between them were settled; the Court held, though by the narrowest majority, that this statement affected the constitution of the debt contained in the note, and was therefore intrinsic to the reference. The minority held, that the previous bill to the defender's father

(a) *Sutherland v. Johnston*, 22 Feb. 1856, 18 D. 626.

(b) *Agnew v. Macrae*, 20 Feb. 1784, M. 13219.

(c) *Fraser v. Fraser*, 27 June 1809, F. C.

had no connection with the granting of the note, as it was not mentioned at that time, and could not be introduced but as a ground of compensation ; in which view, being prescribed, it could not be instructed except by the pursuer's writ or oath. But it does not seem to have been disputed that, if it had entered into view, as was held by the majority, in granting the note, it must affect the constitution of the debt contained in it. As to the constitution of the debt, there is reason to doubt the soundness of the decision in another case (*a*), where the acceptor of a prescribed bill having deponed, on reference to his oath, that it was granted for the price of smuggled goods, and that, though he had not paid the whole, yet, from the loss which he had sustained on the goods, he considered himself as owing nothing, the Court held the first of these statements to be an extrinsic quality requiring a separate proof ; and therefore decerned for the claim. It would rather appear, that it was intrinsic to the question, whether there was a claim, as it tended directly to establish the nullity of the claim. 'The result of the older as well as the more recent decisions appears to be, that statements affecting the constitution of the debt are intrinsic. Thus a statement under the triennial prescription, that a law agent agreed to conduct business for which he was charging on speculation, is intrinsic (*b*) ; and under the sexennial, a statement as to the value given is intrinsic (*c*).'

As to the subsistence of the debt, it has been held (*d*), where the debtor in a bill deponed, that, as the parties discovered, after the bill was granted, that the creditor owed him more than its amount, the latter had agreed to cancel the bill, which was not then in his possession ; this was an intrinsic quality of the reference, seeing it "proved the debt not to be owing." In another case (*e*), of an action on a bill, which, however, occurred before the 12 Geo. III. c. 72, the pursuer having ultimately referred resting owing to the oath of the defender, who deponed that he accepted the bill, and had not paid it, but that the creditor in it had received sums

Statements as
to resting
owing.

(*a*) *M'Neill v. M'Kissock*, 28 Feb. 1805, Morr. App. v. Oath, No. 1.

(*b*) *Knox v. M'Caul*, 8 Nov. 1861, 24 D. 16.

(*c*) *Young v. Sheridan*, 24 Feb. 1837, 15 S. 664.

(*d*) *Grant v. Grant's Creditors*, June 1793, Morr. 13221.

(*e*) *Forrester v. Elphinstone*, 13 Nov. 1742, Morr. 13215.

from him beyond its amount, and had agreed, on that and other grounds, to give it up to him, the Court found that this oath did not prove resting owing. Both these cases establish, that any answer which directly proves the payment or discharge of the debt, is intrinsic to the question of resting owing.

Statements of
counter claims.

On the other hand, when the defender does not deny that the debt is resting owing, but states that it is balanced by a counter claim, this is a quality extrinsic to the reference ; for counter claims do not extinguish the debt *ipso jure*, but merely afford a ground of defence or of separate action, in both of which views they must be proved ; and the defender, therefore, cannot obtain the benefit of them, merely by introducing them into an oath respecting the debt in question, with which they have no proper connection. On this ground, in an action on a bill (*a*) brought before the 12 Geo. III. c. 72, resting owing being referred to the acceptor's oath, and he having deponed that he had accepted and had not yet paid the bill ; but having stated that his debt was compensated by a sum which the original creditor had agreed to give him for board, and by other claims, the Court found, that he could not plead compensation on such claims, except in so far as he had instructed or could instruct them. A similar decision was pronounced in another case (*b*), where a party having, in letters written after the lapse of prescription on a promissory-note, acknowledged the debt, but alleged counter claims, it was decided that these claims were extrinsic, and must be proved *aliunde*. 'The proof of such counter claims must be in a separate action, and it is incompetent to supersede extract in the action on the bill, until they are constituted (*c*).'

Statements of
compensation.

Where the defender (*d*), in a statement admitted as equivalent to his oath, alleged that he had granted a bill for value in a quantity of wine which had turned out so bad as to be useless,—that the pursuer had told him he need not return it, as nothing was to be charged for

(*a*) *Mitchell v. M'Ilroy*, 11 Feb. 1751, Morr. 13241.

(*b*) *Macdonald v. Crawford*, 7 Mar. 1834, 12 S. 533. In a subsequent case, where there was a reference to the charger's oath, the charger admitted that all the bill had been paid except L.6, but claimed this for expenses.

It was held that his statement that such expenses were due was extrinsic. *Wright v. Macfarlane*, 16 Dec. 1837, 16 S. 67.

(*c*) *Thomson v. Duncan*, 10 July 1855, 17 D. 1081.

(*d*) *Robertson v. Clarkson*, 19 Nov. 1784, Morr. 13244.

it,—and that he had incurred great loss in using means to rectify it, the Court, holding that such a statement resolved into a claim of compensation, found that it could not be established except by a separate action. It related to transactions which took place after the constitution of the debt, and could not affect it when constituted, except by compensation. The same decision was given (*a*), where the acceptor of a prescribed bill having deponed that he had granted it in exchange for another bill, on condition that the terms of a certain lease were punctually performed, and that there was now an arrear of rent under the lease, besides another claim for a business account, the Court, holding that these claims resolved into a plea of compensation, found them extrinsic to the reference. It was pleaded, but without success, that the stipulation as to the lease entered into the constitution of the debt; and, at any rate, the extent to which that could form a ground of deduction from the bill, depended on the amount of the claims under the lease, which the defender was bound to instruct by separate evidence. In another case (*b*), the defender, in an action on a prescribed bill, having deponed, on reference, that it was extinguished by a bond for a sum of money, which he had granted to the creditor with that view, this statement, being contrary to the terms of the bond, which bore to be granted on a different account, was held to be extrinsic. ‘In a recent case the distinction was taken, that where it was alleged to be part of the original agreement, that the bill should be compensated in a certain way, that statement was intrinsic; but that if it was a part of a subsequent agreement, then it was extrinsic (*c*). The distinction in this case was refined, and suggests the question whether it was ever intended that proof under the statute should be made the subject of such elaborate criticism.’

There is a short notice of two early cases (*d*), where, in actions on bills, payment having been referred to the pursuer’s oath, and he having deponed that he had got a partial payment, but that it was made to a separate open account, this was held to be extrinsic. The soundness, however, of these decisions may be questioned,

(*a*) *Rankin v. Adair*, 29 June 1799, Morr. 13245.

see also *Mitchell v. Ferrier*, 23 Dec. 1842, 5 D. 169.

(*b*) *Williamson v. Peacock*, 11 Dec. 1810, F. C.

(*d*) *Reid v. Binning*, 6 Jan. 1670, M. 13202; *Cameron v. Danskine*, Feb.

(*c*) *Thomson v. Duncan*, *ut supra*;

1730, 2 Fol. Dict. 295, M. 13207.

since the oath was intrinsic to the payment of the bill, being a statement that it had not been paid.

Statements of
payment.

‘ “ When the oath proves the constitution and original justice of the debt, the mere belief or opinion of the debtor that it is no longer due, though conscientiously entertained and asserted upon oath, will be of no avail, unless he specify and swear to some precise mode of extinction, of which he had direct or reasonable cause of knowledge ” (a). Thus it is extrinsic for a party to say that the bill was paid by a third party, in circumstances which he cannot explain (b); or that he had been told that it had been paid by a co-acceptor (c); or that he had himself paid it to somebody whom he believed to represent the pursuer, but whom he did not know, and never saw before or since (d); or that he had paid to a creditor of the pursuer’s, of whose authority to receive it on his behalf he knew nothing (e). It is otherwise if the defender depone to a distinct and definite mode of payment, as, for example, where he asserts that he gave money to his factor to do so, and that his factor entered the payment in his books, and told him he had paid it (f); or that he had paid it to the pursuer’s factor (g); or that the pursuer had formerly intromitted with the defender’s funds (h), or used diligence (i), and so paid himself.’

Payment by
composition.

It has been decided, that a statement on oath, that the creditor agreed to a composition contract (the efficacy of the contract depending on the accession of other creditors, which required to be proved by separate evidence), is extrinsic, and cannot be held as included in the reference by the creditor. But the Court allowed parties to be heard as to the effect of the composition contract (k). The proof of the accession of the other creditors failed. ‘In another case, where the defender alleged that the bill had been

(a) *Per Jeffrey* in *Paul v. Allison*, 10 Mar. 1841, 3 D. 875; see also *Stewart v. Robertson*, 13 Dec. 1852, 15 D. 12.

(b) *Paul v. Allison*, *ut supra*.

(c) *Black v. Black*, 27 June 1838, 16 S. 1220.

(d) *Smith v. Ivory*, 26 Dec. 1807, H. 462.

(e) *Crichton v. Campbell*, 6 Mar. 1857, 19 D. 661.

(f) *Mackay v. Ure*, 7 Mar. 1849, 11 D. 982.

(g) *Fyfe v. Carfrae*, 3 Dec. 1841, 4 D. 153.

(h) *Heddle v. Baikie*, 17 June 1847, 9 D. 1254.

(i) *Thomson v. Balvaird*, 18 Dec. 1834, 13 S. 212.

(k) *Brown v. McIntyre*, 26 June 1828, 6 S. 1022; 1 June 1830, 8 S. 847.

paid, under an assignment in England, the Court held the statement extrinsic, but allowed inquiry into the effect of the English proceedings (a).'

SECTION III.

LIMITS OF THE SEXENNIAL PRESCRIPTION.

It has been already mentioned (b), that, by the 12 Geo. III. § 40, "the years of the minority of the creditors in such notes or bills shall not be computed in the said six years." This enactment, from its terms, was probably meant to apply, not merely to the payees in bills or notes, but to creditors by indorsation, who, indeed, require the exception as much as payees. Such indorsees appear to have this benefit, although the previous holder, himself a major, should indorse the bill or note to a minor the day before the lapse of the six years; for, though the years of prescription would thus be extended during the whole minority, while they would have expired immediately if the bill or note had remained with the payee, this is a consequence of the negotiability of such documents. The efficacy, however, of such an indorsation must depend on the fact of its being made during the six years. If, therefore, it is made afterwards, but dated within that period, or not dated at all, in which case it is presumed to be of the same date with the bill, it will notwithstanding be competent to prove the true date of making it, as it is a fraud against the statute.

Exception of minority.

Minority cannot be pleaded by parties who have no direct title to the bill, but are merely interested in it as legatees under a trust-deed, when it is granted to one of the trustees personally for part of the trust-funds. In such a case, the trustee, or, on his death, his executor, is entitled to exact payment (c). This seems to follow, though the bill or note were taken payable to him by the denomination of trustee; for, although his executor would not probably be entitled, in that case, to exact payment, as trusts are not transmis-

(a) *Stevenson v. Stevenson*, 1 June 1838, 16 S. 1088.

(b) *Antea*, p. 459.

(c) This was one of the points decided in *M'Neill v. Blair*, 31 Jan. 1823, 2 S. 174.

sible, and though the parties interested under the trust might have an equitable right to bring an action for payment, in which action the bill or note might be produced in proof of their interest, yet they are not properly creditors in terms of the statute.

Outlawry.

It is no objection to the currency of the sexennial prescription, that the debtor in the bill has, during the whole or a part of it, been under sentence of outlawry (*a*); for the statute makes no such exception; and, indeed, as outlawry merely affects the rights of the person outlawed, it does not appear to render an action against him incompetent, though it cuts off his right to defend himself against it.

Claims not arising *ex facie* of bills or notes.

The sexennial prescription applies only to claims appearing on the face of bills or notes, and not to separate claims from transactions connected with them. It has therefore been decided (*b*), that it does not apply to an acceptor's claim of reimbursement for having paid certain bills accepted by him for the drawer's accommodation, since that is a separate debt arising from the advance of the money, as to which the bill is merely an article of evidence, or to a claim of indemnity by an acceptor against a co-acceptor, for whose accommodation he had subscribed the bill (*c*). The same doctrine seems applicable to the drawer's claim of recourse, when he is not likewise payee, against the acceptor, since he claims, not as a creditor on the bill, but only for indemnity, after he has paid it to the proper creditor. The exception in favour of minors, which provides only for the "minority of *the creditors* in such bills or notes," seems to prove that the statute had in view only the case of direct creditors. 'On the same grounds, the claim of a factor, who has paid bills on behalf of his principal, to reimbursement, is not cut off by the prescription; and the discharged bills may, notwithstanding, be used as *adminicles* of evidence (*d*).

'Receipts written on prescribed bills may, as we have just seen, be used as evidence, but they cannot be used as grounds of action

(*a*) *Brodie v. Sheddan*, 20 Feb. 1821, F. C.

(*b*) *Roy v. Campbell*, 14 June 1850, 12 D. 1028; *Ralston v. Lamont*, 23 May 1792, M. 1533, 11130. *Vide* also *Soutars v. Soutar*, 29 June 1827, 5 S. 876, as to the inapplicability of the

sexennial prescription to a letter of relief granted by two acceptors of a bill to their co-acceptor.

(*c*) *Jolly v. M'Neill*, 28 May 1829, 7 S. 666.

(*d*) *Hall v. Arnott*, 19 Dec. 1837, 16 S. 267.

when they cannot be read independently from the bill. Thus it is clear, that after prescription the acceptor cannot be sued on a receipt by the drawer to the holder, because the acceptor's connection with the transaction cannot be made out except by reading the bill as an actionable document (a).'

The question, whether the Scotch prescription or the English statute of limitations applies to a bill or note, 'has already been noticed (b).'

When Scotch
or English
limitation
applicable.

(a) *Buchanan v. Macdonald*, 15 July 1840, 2 D. 44.

(b) *Antea*, p. 89. The discussion of this question, which occurred at

this place in former editions, has not been reprinted, as it was written before the case of *Don v. Lippman* was decided.

CHAPTER IX.

OF BILLS AND NOTES AS AFFECTED BY INSOLVENCY OR BANKRUPTCY.

WE have hitherto discussed the constitution, transmission, and enforcement of bills or notes, on the supposition that all parties concerned in them are solvent. It is now to be considered what effect the insolvency or bankruptcy of the parties by or in whose favour a bill or note is granted, by or to whom it is transferred, or by or against whom payment is to be enforced, has on the rights connected with it.

In discussing this subject, it is necessary to distinguish between the nature and effects of insolvency and bankruptcy.

Insolvency
and bank-
ruptcy.

Insolvency, or the mere inability of a person to pay his debts, whatever obligations it may create between the debtor and his creditors, does not alter his relation to third parties ignorant of it, or invalidate their dealings with him. But if it has become notorious, he is then said to be bankrupt (*a*). Notwithstanding bankruptcy, the bankrupt remains vested with the right both to his personal and heritable estate, is entitled to enforce all obligations previously contracted in his favour, and is *in titulo* to all bills or notes granted, drawn or indorsed to him.

Can drafts in
favour of a
bankrupt be
recalled?

With reference to this subject, supposing that a person who has bought goods from another draws a bill, or indorses a bill or note to him for the price, on the faith of receiving the goods, and the seller becomes bankrupt before delivery, a question has been

<p>(<i>a</i>) At the date of the last edition of this work, the bankrupt statute in force was the Act 54 Geo. III. c. 137. Since that, a subsequent Act, 2 & 3 Vict. c. 41, took its place, and both of</p>	<p>these Acts are in turn repealed by the 19 & 20 Vict. c. 79, which, along with the amending Act 20 & 21 Vict. c. 19, now regulates bankruptcy in Scotland.</p>
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raised (a), how far he can recall his drafts or indorsements. This question also occurs, when a banker gives drafts or indorsements at short dates, in exchange for bills at long dates, and attempts to recall them, in consequence of the acceptors of the long-dated bills, and the payees of his drafts or indorsements who gave him these bills, failing before they become due. In both these cases, the drafts or indorsements are irrevocable, when in the hands of an onerous indorsee, since he is not liable to exceptions pleadable against his author; and though they have not been accepted, he has a right to present them for acceptance at any time before the term of payment, besides having recourse, on non-acceptance or non-payment, against the drawer and indorsers. The question can only occur when the drafts or indorsements are in the hands of the original receiver at his bankruptcy. Even in that case, if the bill has been accepted or presented for acceptance before his bankruptcy, it cannot be recalled, because on acceptance or presentment it operates a complete assignment to the holder of the drawer or indorser's funds in the drawee's hands. The distinction between actual and constructive delivery is here inapplicable, as it relates exclusively to goods. The only question is, Whether the draft or indorsement can be countermanded by notice to the drawee not to pay, or by withdrawing the funds from him, when it has not been presented or notified to the drawee before the receiver's bankruptcy?

In England, such a case (b) occurred with a foreigner, who, having stock in the British funds, employed agents in London to sell it for him, and remit to him bills on Holland for the proceeds. The agents got bills in his favour from a London house, on the faith that this house would be indemnified from the sale, having given the bills before getting the money, agreeably to a practice regarding foreign bills, viz. that they are remitted on one post-day, and the money not given for them till next post-day. Before next post-day the agents failed, so that the drawers never procured money for the bills; and the latter having, in consequence, sent to the drawees in Holland to countermand payment, the holders of the bills brought an action of recourse against them. But Lord Loughborough,

(a) Glen, 337, 2d edit. (b) *De Bras v. Forbes and Gregory*, 1 Esp. 118.

C. J., held at *Nisi Prius*, that though an onerous indorsee would have had a good action, they could have none, because they were liable to the same exceptions as their agents who had got the bills; and the right of the agents was held to be conditional of their paying the stipulated price for them. Such a condition could not be proved in Scotland against a bill-holder but by his writ or oath, or judicial admission. But supposing it to be thus proved, the drawer and indorser of the bills seems entitled to countermand payment of them by the drawee, if not previously presented, or to withdraw his funds from the drawee. Till presentment, the funds are his, so that his creditor arresting them in the drawee's hands before presentment of the bill, would be preferred to the holder; and hence he may detain them by a new mandate to the drawee, contrary to that which he has given by drawing the bill. This mandate, indeed, would not be effectual against an onerous indorsee, although the latter had not presented the bill; because the drawer, by putting an indorsable document into his debtor's hands, enables him to give an indorsee the power of completing his right at any time by presentment, and is excluded from giving a contrary mandate. But the surrender of his right to the original receiver of the bill was merely conditional; and on the condition not being fulfilled, his power over the funds, as to this party, revives. If he withdraw the funds from the drawee before the bill is presented by the receiver, the latter has only a personal claim of recourse against him, which, in the case now supposed, would be met by personal exception. In such a case, even an onerous indorsee could have no vested right in the funds, since they are gone before his right could attach. But he would have a claim of recourse against the drawer, exclusive of the personal exception against his author.

With regard to the transference of notes and cash to a party who becomes bankrupt, it has been decided (*a*), that, when parties transmitted cash and notes to a banker's establishment in Edinburgh, for the purpose of being remitted to London, and applied to their use there, but the banker had previously stopped payment in London, and notice of the stoppage arrived in Edinburgh a few hours afterwards, the parties were entitled to recall their cash and notes, as the

(*a*) *Cunninghame and Others ex parte*, affirmed by the Lord Chancellor, 3 D. in *R. Maberley*, 3 D. and Ch. 58-86; and Ch. 87.

banker was unable to carry into effect the purpose of remitting them; and his assignees having, as was held, taken possession of them, and given effect to a claim of lien set up by his agent over them, were found liable in restitution of their amount. In another case arising out of the same bankruptcy, where this banker's agent in Scotland had received notes of another bank, under an agreement to exchange them weekly for his notes in their possession, and the assignees had also intromitted with them, in the same manner as with the notes and cash already mentioned, it was decided, 1st, That the other bank was entitled to insist on the exchange, notwithstanding the intervening insolvency; and, 2dly, That the assignees, having intromitted with the notes, were bound to make good their value (a). A claim similar to that referred to in the first case was rejected, when it appeared that the notes sent by the party claiming, though remitted in a parcel to the insolvent banker's agent, had never been received by him, or entered in the books, but were stolen by a clerk of his the day after the parcel arrived (b).

When the right to a bill or note has been once fully vested in a party, bankruptcy does not divest him. If he is not in trade, his moveable effects can only be attached by poinding, or the debts due to him by arrestment in his debtor's hands. It has been already shown (c), that bills or notes cannot be attached, unless by arrestment in the hands of the acceptor or granter as the proper debtor, or by arrestment in the hands of any other parties to the bill or note after it has been dishonoured, and the dishonour duly notified to them; in which case they become the debtor's, accompanied in both cases with a process of exhibition against the person to whom the bill or note is due, that he may produce it, and an application to the Court to sequestrate it, in order to prevent him from indorsing it. It will thus remain secure till the arrester obtains a decree of forthcoming on his arrestment, which will entitle him to exact pay-

Effect of bankruptcy.

(a) *National Bank of Scotland ex parte*, 4 D. and Ch. 42.

(b) *Watson ex parte*, 4 D. and Ch. 45. In *Price v. Tennant*, 13 Feb. 1844, 6 D. 659, a question as to the right to countermand occurred. A bill-broker in Glasgow bought with a bank's money a bill payable in London, and gave it to the bank's agent,

with an open letter from himself to a London bill-broker, directing the latter to pay the bill to a person on the bank's account. It was held, in a question between this person and the Glasgow bill-broker, that the latter could not countermand the payment.

(c) *Antea*, p. 194.

ment from the arrestees. Such arrestment, however, in case of the person for whose debt it was used becoming bankrupt, falls under the '19 & 20 Vict. c. 79, § 12, repeating the' 54 Geo. III. c. 137, § 2, which enacts, that, in such a case, all arrestments used either on a liquid document of debt, or on a depending action or libelled summons, provided the action be followed out without delay, within sixty days before or four months after the debtor has been thus made bankrupt, shall be preferred equally; and that, though any one arrester has got decree of forthcoming and recovered payment, he shall be obliged to communicate his preference, under deduction of his expenses. Arrestments used more than four months after bankruptcy are not allowed to compete with those used within the four months, but are ranked *inter se*, agreeably to the former law, according to their respective dates of execution. The same rule is also laid down by this Act as to poindings.

Sequestration
and its effect.

'After sequestration, a bankrupt is entirely divested of his property. The act of confirmation of the trustee transfers to and vests in him, or any succeeding trustee, for behoof of the creditors, the whole property of the bankrupt. This transfer takes effect as at the date of the sequestration (a).'

Division of
subject.

These distinctions, as to the several effects of insolvency, bankruptcy, and sequestration, must be kept in view, in considering the consequences that arise from each, especially with regard to bills or notes, whether belonging to or due by the bankrupt. In discussing this subject, we shall consider,—

1st, The power which a person retains over his property, notwithstanding insolvency, bankruptcy, or sequestration, more particularly with reference to bills or notes.

It is here assumed, that there is no question regarding the bankrupt's title to the bills or notes in his possession. But there may be such questions in the case of a banker or other agent receiving bills or notes from his constituent. It will therefore be necessary to consider,—

2dly, In what cases such bills or notes are to be regarded as his property, and when that of his constituent; and what power he or his creditors have over them in the latter case. His power in the first of these cases is included under the preceding head.

(a) 19 & 20 Vict. c. 79, § 102.

After insolvency, bankruptcy, and sequestration have been thus considered, as to their effect on the bankrupt's power over his own bills or notes, or those in his possession, it will remain to discuss,—

3dly, The effect of these several events on the claims arising against his estate from bills or notes.

SECTION I.

BANKRUPT'S POWER OVER HIS PROPERTY, AND ESPECIALLY OVER BILLS AND NOTES.

1. *Bankrupt's Power at Common Law.*

If the party is merely insolvent, such payments are in general valid; as he has still the administration of his estate, and can alone receive and discharge debts due to him, or pay those due by him. It has indeed been determined, that a person, who knew his affairs to be desperate, and had resolved on a declaration of bankruptcy, was guilty of fraud when he purchased goods from third parties, as he knew that he could not pay for them, and that therefore his creditors, coming in his place, must restore them to the seller (a). This, however, was decided, not on the mere ground of insolvency, but on the ground of *fraus dans causam contractui*. Insolvency, unless plainly irretrievable, does not preclude a person from entering into new contracts; and even irretrievable insolvency does not take away his power to make or receive payments. So long as he is vested with his estate, he alone can receive payments. Payments by him are also valid, if the term of payment has come, although the creditor should urge him for payment on account of his insolvency; for he has full power to make payment, and the creditor, in enforcing it, is only securing his own rights. It will be accounted a payment if he gives his bill at a discountable date, and afterwards retires it, since that is a usual mode of making payment. But a payment is challengeable on the ground of fraud, when made before the debt falls due (b); at least slight additional circumstances will

Payments of
bills or notes
by or to an
insolvent;

(a) *Vide* 2 Bell, 245-7, and cases therein cited.

(b) 2 Bell, 245.

ruptcy, become reducible. A premature payment be often regarded merely as a scheme to evade

or by or to
unsequestrated
bankrupt;

Even if a person, after being bankrupt, con-
nistration of his estate, payments to or by him, of
of payment, are valid. The suspicion of fraud
creased, but the legal grounds for presuming
from those which have been mentioned with refer-
The case of payment by means of bills, by a
afterwards considered.

or by or to
sequestrated
bankrupt.

In the case of sequestration, which, as already
the debtor's whole estate in the trustee, as from
deliverance, it is enacted '(a), 1st, That "all pay-
ences, and securities obtained by or granted to pri-
acts done or deeds granted by the bankrupt at
sequestration and before his discharge, out of or
estate (unless with the consent of the trustee), at
sequestration being awarded, be null and void
shall be entitled to such preference or security,
so paid, deducting any expense *bona fide* incurred
provided, that "if a debtor, in ignorance of the
paid his debt *bona fide* to the bankrupt, he shall
pay it a second time to the trustee." And, 3dly,
"if the possessor of any bill or promissory-note or
the bankrupt, or of a security for a debt due by the
recourse on other parties, shall have received pay-
from the bankrupt in ignorance of the sequestra-
such bill, promissory-note, or security to the bank-
shall not be liable to repay to the trustee the amount
unless the trustee shall require him to do so."

actually grant or transfer a bill or note? When he is dead, the right to his estate generally, and to bills or notes due to him, becomes vested in the trustee, and therefore he can exercise the right of transference. But there are also certain restrictions on the right of transference, through insolvency or bankruptcy.

Insolvency does not restrict at common law a person's power of conveying any part of his estate, or consequently of transferring bills or notes belonging to him, whether by indorsing them or by putting them blank indorsed, or his power of granting such bills, so as to found a claim against his estate, or of giving bills to persons possessed of his funds, which operate (a) as assignments of these funds. No doubt, if the receiver of such bills, drafts, took them in furtherance of a plan between him and the debtor to defraud his creditors, his right would be reducible to nothing on account of fraud, even at common law. On this ground, probably in one case (b), the arrester of funds belonging to a bankrupt was preferred to an indorsee apparently onerous, as there were presumptions that he knew of the bankruptcy when he took the bill, and was *particeps fraudis* with the bankrupt. Various circumstances will be received as indicative of fraud, without direct proof. For instance, the mere fact of the debtor's insolvency with the absence of a valuable consideration from the payee or indorsee of a bill, will set aside that party's right (c). The circumstance of acquiring a right from an insolvent person without consideration creates a reasonable presumption of fraud against him; and it is held that this should operate against him, as he cannot suffer from that direct injury should be inflicted on the creditors (d). In order to make out a case of fraud, it is not necessary, as a general rule, to prove complicity on the part of the creditor preferred, but there may be circumstances in which fraud could not be proved without proof of his accession to the scheme (e).'

By insolvent;
good at com-
mon law where
there is no
fraud;

See 104 *et seq.*

Grant v. McKay's Creditors,
1335, *Elchies v. Bill*, No. 7.
See 243.

McGour v. Thomson, 16 Feb.
1810. In this case a gratui-
tous assignment to a stranger, granted
in an onerous cause, by a person

not hitherto proved to be insolvent,
and against whom no diligence had
been then used, though he became
bankrupt soon afterwards, was set
aside in an action by a prior creditor
of the grantor.

(e) *McCowan v. Wright*, 10 Mar.
1853, 15 D. 494.

The proof of insolvency and want of consideration will in general be thrown, in such a case, on the party reducer. Want of consideration, as an element in the presumption of fraud against the receiver of the bill or note, may, if the latter knew of the granter's insolvency, be instructed by parole evidence, even against the presumption of value arising *ex facie* of the document (a). The question here is not with the common debtor, but it is alleged that the debtor and the receiver of the document have combined to defraud *the creditors at large*, who were no parties to the transaction, and therefore there is no bar against their investigating the case in the manner usual with regard to all *pacta illicita* (b), viz. by a proof at large. The insertion of an onerous cause in the deed is only a part of the fraud, which such investigation must be employed to defeat. There are also other circumstances admitted as indicative of fraud, which need not be here detailed (c).

or till reduced ;
or in the hands
of *bona fide*
holder for
value.

Though the right acquired should be fraudulent, yet, being complete in itself, it will remain good till it is reduced ; and as the fraud which authorizes the reduction is personal to the receiver, it will form no objection against the right of a *bona fide* onerous indorsee. Onerosity and *bona fides* will be presumed, unless the contrary appears *ex facie* of the bill or note, or is proved by the holder's writ or oath (d) ; for, though it should be alleged that he knew of the fraud between the insolvent and his author, he is not thereby accessory to it (unless the transference to him was *par ejusdem negotii* with the original transference), since the fraud is held to have been completed by the transference of the bill or note to the original receiver. An indorsee, therefore, deriving right from the original receiver, must be entitled to the ordinary privileges of an indorsee.

Bills by bankrupt to obtain discharge.

We have already noticed (e) one species of fraudulent transaction between a bankrupt and his creditors, which is ineffectual both at common law and by statute, viz. the granting of bills or notes by the former to any of the latter, to induce them to agree to a composition or concur in his discharge. In a case of this

(a) This holds, though a consideration should be specified in the document ; *Morrison v. Carron Co.*, 20 July 1854, 16 D. 1125.

(b) *Antea*, p. 51, etc.

(c) *Vide* 2 Bell, 242 *et seq.*

(d) *Craig v. Shiells*, 15 Dec. 1809. F. C.

(e) *Antea*, p. 77.

kind (a), the bills challenged being still in possession of the creditor who had unlawfully obtained them, it was found competent for the granters, without a reduction, to bring a process before an inferior court, concluding that the creditor should either deliver them up or pay their value; and this action was sustained, not merely to the effect of having the bills sequestrated *in manibus curiæ*, till their validity was determined, so as to prevent their indorsement to a third party, but as a petitory action for their final delivery to the creditor, or the payment of their amount. The action must have proceeded on the assumption that, in the creditor's hands, they were null without reduction.

2. Act 1621, c. 18.—*First Branch.*

Independently of the proof of fraud which is necessary at 1621, c. 18. common law to invalidate a bill or note granted or indorsed by an insolvent person, while in the hands of a party accessory to the fraud, there is also a presumptive fraud established by the Act 1621, c. 18.

This Act was passed, 1st, That, in case of a debtor's insolvency, deeds granted by him, without value, to his relations or confidants, in prejudice of prior creditors, might be set aside; and, 2dly, That, in the same case, certain deeds granted by him *in fraudem* of the prior diligence of creditors might be challengeable.

On the first point, the statute (which is in the form of an Act of Sederunt of the Court of Session, ratified by the Legislature) enacts, "That, in all actions and causes depending, or to be intended by any true creditor for recovery of his just debt, or satisfaction of his lawful action and right, they" (viz. the Court of Session) "will decree and decerne all alienations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his lands, teinds, reversions, actions, debts or goods whatsoever, to any conjunct or confident person, without true, just, and necessary cause, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors, to have been from the beginning, and to be in all times

(a) *Riddel v. Christie*, 20 Nov. 1821, 1 S. 151.

making null and of no effect, force or effect of the true and just creditor, by way of action, without further declaration." There is another case of parties deriving right from the contract and action taking immediately of the bankruptcy, which shall be mentioned.

This statute, as well as every other matter under bankruptcy, has been fully discussed by a learned man. But as the construction given to the statute often differs from its literal meaning, it is necessary to give a summary of the doctrines which have been settled regarding it.

Who may
challenge
under the Act?

(1.) None but creditors, 'or a trustee on a sequestration for their behoof (b),' can challenge the deeds provided by the statute. But parties holding gratuitous obligations the insolvent may do so, being in fact creditors. This has been decided (c), that one gratuitous assignment affords ground for challenging another posterior to it in date first intimated, on the ground that the first created a debt to the grantor, under a clause of warrandice. So the indorsement of a bill or note as a donation, would entitle the holder to challenge any subsequent deed of the indorser which fell under the statute.

Must creditors
be proved?

(2.) The statute does not confine the right of challenging to those who have been creditors before the date of the deed challenged, but seems to extend it to all creditors. Accordingly, the latest construction given to it (d), although a distinction afterwards noticed, has been taken between prior and subsequent creditors, regarding the proof of insolvency. 'The Bankruptcy Act of 1856 (e) expressly provides, that the trustee may redempt deeds for behoof of the whole body of creditors.'

The date of the challenging creditor's debt is determined by the date of the contract constituting it, not by the date of the decree of constitution; and, accordingly, if the contract was prior to the deed challenged, it will be accounted a prior debt.

(a) 2 Bell, 183-204.

(b) 19 and 20 Vict. c. 79, §§ 10 and 11.

(c) *Alexander v. Lunde*, 19 July 1875, M. 940.

(d) 2 Bell, 184 and 196 it down, that the benefit of challenge, when successful, is for the whole body of creditors. (e) § 11.

the deed constituting it is posterior (*a*). If the deed challenges a bill or note, it will probably be presumed to have been made on the date which it bears (*b*). A draft by the debtor, not effectual as an assignment of his funds in the drawee's hands, if it is intimated to him, will be considered, with reference to the law, as completed on its date. In a question as to the validity of an indorsation or acceptance, when they have no separate date, they will probably (under the limitations already explained (*c*)) be presumed to be of the date of the bill or note. But it may be proved by extraneous evidence that this is not their true date.

The creditor must prove that the grantee of the deed is conjunct or confident with the granter (*d*). In the case of a person who is a conjunct person, the Court has adopted the same rule as to the degree of relationship which disqualifies a person from judging in the cause of another; and so, it has been held that brothers (*e*), uncles (*f*), sons-in-law (*g*), step-sons (*h*), nephews or brothers-in-law (*i*), are conjunct persons in terms of the statute. But it has been found that an uncle-in-law (*k*), and a wife's sister (*l*), and a cousin (*m*), are not conjunct persons. Confident persons are those whose connection with the granter establishes confidential habits between them, such as partners, agents, factors, confidential men of business (*n*). It is impossible to define all the circumstances which may constitute a confidential person. It has been decided that a party who had acted as agent, or trustee for his brother's illegitimate son, is considered confident with him (*o*).

What the challenger must prove. Proof that grantee conjunct.

Pollock v. Pollock's Creditors, 1669, M. 1002; *Street v. Maly* 1669, M. 1003.

Id., p. 36.

Id., p. 177; and p. 216.

It is essential under the Act even though there should be insolvency, no value, and no prior creditors; *Wilson v. Paterson*, 20 Dec. 1853, 16

Law v. Park, 15 June 1621,

*Marpersie's Creditors v. Kin-
Dec.* 1673, M. 900.

Den v. Betson, 17 Jan. 1632,

M. 896; *Gibb v. Livingston*, 25 July 1766, M. 909.

(*h*) *Mercer v. Dalgarno*, 19 Dec. 1694, M. 12563.

(*i*) *Hume v. Smith*, 5 July 1673, M. 899; and *Scot v. Ker*, 18 June 1712, M. 12569.

(*k*) *Elibank v. Adamson*, 8 Feb. 1712, M. 12569.

(*l*) *M'Gowan v. M'Kellar*, 24 Feb. 1826, 4 S. 498.

(*m*) *M'Dowal v. Fullarton*, 8 June 1714, M. 12569.

(*n*) 2 Bell, 187.

(*o*) *Laing v. Cheyne*, 18 Jan. 1832, 10 S. 200.

Proof of want
of considera-
tion.

(4.) If it be proved that the deed under challenge has been granted to a conjunct or confident person, the grantee must establish that it was given, in terms of the statute, for just, true, or necessary causes, or for a price truly paid (*a*). What such considerations may consist of, such as value instantly given, prior obligations, cautionary engagements, marriage-contracts, antenuptial or post-nuptial, has been fully explained by the learned author already referred to (*b*). The receiver of the deed must prove that it was granted for some such consideration, otherwise it is null. One clause, indeed, of the statute points it out as sufficient, if the deed is established by the writ or oath of the receiver to have been granted without “any true, just, and necessary cause, or without any true and competent price.” But this is not the only proof of fraud; the previous clause of the statute imports that fraud shall be presumed, unless there are onerous causes, which are not to be taken for granted till they are proved. This, accordingly, is the construction given to the statute. It has been questioned, whether the narrative of the deed, that it was granted for value, is sufficient. But it has been settled, that it is not, in deeds granted to conjunct or confident persons (*c*). It was indeed at one time held, as to bonds or assignments bearing to be for specific sums of borrowed money (*d*), especially when supported by a fitted account between the receiver and common debtor (*e*), or as to a disposition bearing to be granted for sums of money (*f*), that such deeds proved their onerous cause,

(*a*) *Vide* Lord Kilkerran’s statement of the opinions of the Court, in *Grant v. Grant*, 9 Nov. 1748, M. 951-2, and 2 Bell, 186 and 191.

(*b*) 2 Bell, 187-90.

(*c*) *Vide* the cases of the *Duke of Buccleugh v. his Grandfather’s Creditors*, 8 July 1757, Morr. 12575; *M’Neil v. Livingston*, 14 Feb. 1758, Morr. 4316; and a number of earlier cases cited by Mr Bell, ii. 191, note 5, of conveyances to conjunct persons. In one of them, *Campbell v. Campbell*, 28 Nov. 1673, M. 12559, it was held, that a bond by a bankrupt to his brother, bearing to be for money borrowed, could not be disproved but by the bankrupt’s oath. But this decision

seems contrary to the other decisions; and besides, these, at all events, import that a general statement of value in the deed is not sufficient proof of it. Still less, then, can such a proof be afforded by the general presumption of value incident to bills and notes, or even by the words “value received,” for which they commonly bear to be granted.

(*d*) *Hop-Pringle v. Ker*, 22 Jan. 1630, M. 12553; *Nisbet v. Williamson and Others*, 6 Dec. 1638, M. 2774.

(*e*) *Gray v. Chiesly*, 4 July 1711, M. 12568.

(*f*) *Skeen v. Betson*, 17 Jan. 1631, M. 12554.

enacted in the Bankruptcy Act of 1856 (a), that deeds made void by it, "and all alienations of property by a party insolvent, or notour bankrupt, which are voidable at statute or at common law, may be set aside either by way of action or exception; and" it is further provided, "that a decree setting aside the deed by way of exception shall have the like effect, as to the party objecting to the deed, as if such decree were given in an action at his instance." As the statute is in the form of an Act of Sederunt of the Court of Session, made to regulate *their own* judgments, and simply ratified by Parliament, an action under it is not competent unless before the Court of Session. 'But the Bankruptcy Act of 1857 has enacted that the enactments just quoted from the Act of 1856 shall "apply to actions and exceptions as well in the ordinary Court of the Sheriff as in the Court of Session." The meaning of this is not so clear as it might have been made; but it is thought that it does not go further than to entitle the Sheriff to set aside any deed of the class mentioned which may be founded on in any action before him, to the effect of enabling him to do justice in the particular action, and that it does not extend to entitle him to entertain an action to reduce such a deed to all intents and purposes (b).'

The right of challenge applies to all bills or notes subscribed by the debtor, whether as acceptor, to rear up a claim against his creditors, or as drawer on a person possessed of his funds, to convey these funds to the payee, or as indorser, so as to convey away the right to a bill or note which might otherwise be available to his creditors. It even applies to the transference by him, without indorsation, of bills or notes blank indorsed, in his possession, since he thereby alienates a *jus crediti* which would otherwise have increased the fund for payment of his debts. The expression (used in the statute) "translation" of "lands," etc., and "debts," seems strictly applicable to such a kind of transference.

To what bills applicable.

Although the reduction under this clause of the Act should be brought only by one creditor, the effect of it, under the Act, is not to give him a preference, but merely to set free the fund which has been conveyed away for the diligence of all the creditors (c).

Who take benefit of reduction?

(a) 19 & 20 Vict. c. 79, § 10.

(c) 2 Bell, 196.

(b) Kinnear on the Law of Bankruptcy, 2d edit. p. 15.

Effect of clause protecting *bona fide* holders for value.

(8.) The Act contains also a clause which enacts, that, “in case any of his Majesty’s good subjects (noways partakers of the said frauds) have lawfully purchased any of the said bankrupt’s lands or goods by true bargains, for just and competent prices, or in satisfaction of their lawful debts, from the interposed persons trusted by the said dyvours; in that case, the right lawfully acquired by him, who is noways partaker of the said fraud, shall not be annulled in manner foresaid; but the receiver of the price of the said lands, goods, and others, from the buyer, shall be obliged to make the same forthcoming, to the behoof of the bankrupt’s true creditors, in payment of their lawful debts.”

This clause protects third parties who acquire the right under challenge onerously and *bona fide* from the original receiver of it. Thus, when a father who was actually, but not notourly insolvent, gratuitously drew a bill payable to his son, which the latter indorsed for value, the indorsee was preferred to a creditor of the drawer, arresting the amount of the bill in the acceptor’s hands (a). In this case, there was proof that value had been given for the indorsation; and it would appear from the Act that such proof is necessary in all cases even for a third party. He must also, in terms of the Act, be “nowise partaker of the said frauds.” His right is therefore challengeable, when he must know of the objections to the right, as where the deed assigned to him bears that the original receiver is conjunct or confident with the granter (b), or that it was granted without value (c). The last of these conditions cannot occur with bills or notes, because they generally bear to be for value, and are, at all events, presumed to be granted or indorsed for value. But the original receiver may be so described in the bill as to show that he is conjunct or confident with the granter. But even in this case, it will be a sufficient defence to the second grantee that the original granter was believed to be solvent at the date of the first deed, or rather that he was not then general

(a) *Brodie v. Steven*, 21 Nov. 1749, M. 907.

(b) *Hay v. Jamison*, 6 Feb. 1672, M. 1009; *Spence v. Dick’s Creditors*, 28 Nov. 1693, M. 1014; *Leslie v. Leslie’s Creditors*, 15 June 1710, M. 1018; *Lyon v. Creditors of Easter*

Ogle, Jan. 1723, M. 1022. The question in these two last cases occurred with adjudging creditors of the receiver; but their situation appears to be the same in principle with that of purchasers. *Vide* 2 Bell, 196.

(c) *Vide* cases cited in note (b).

known, and that there is no evidence of this grantee knowing him to be insolvent (a); for, unless in the case of diligence begun at the time against the original grantor, which is provided for by another clause of the Act, fraud is not presumable against a third party merely from the grantor's insolvency, unless it is proved that it was known to him (b).

3. *Act 1621, c. 18.—Second Branch.*

The second branch of the Act 1621 enacts, that "if in time coming any of the said dyvours, or their interposed partakers of their fraud, shall make any voluntary payment or right to any person in defraud of the lawful and more timely diligence of another creditor, having served inhibition or used horning, arrestment, comprising, or other lawful means, duly to affect the dyvour's lands or goods, or price thereof to his behoof; in that case, the said dyvour or interposed person shall be holden to make the same forthcoming to the creditor having used his first lawful diligence, who shall likewise be preferred to the co-creditor, who, being posterior unto him in diligence, hath obtained payment by the partial favour of the debtor, or of his interposed confidant, and shall have good action to recover of the said creditor that which was voluntarily paid in defraud of the pursuer's diligence."

1621, c. 18;
Second
Branch.

This clause cannot apply to bills or notes considered as assignments of the bankrupt's funds, in prejudice of inchoate diligence, unless so far as such diligence would otherwise have attached the funds. It does not therefore appear at first sight to affect the indorsement of such documents, or the assignation which it implies of the drawer's funds in the drawee's hands, when the draft has been previously accepted, or intimated to the drawee. For these funds, as has been already shown (c), are transferable by every indorsation of the bill; and, as such indorsations cannot be restrained by diligence, neither can diligence attach the funds,

Application to
bills and notes.

(a) The last of these alternatives (and consequently the first *a fortiori*) is implied in the opinion of the Court in *Spence v. Dick's Creditors*, M. 1016.

(b) 2 Ball, 196.

(c) *Antea*, p. 104 *et seq.*

because they must follow the document that forms the title to them. But it has been shown, that an arrestment in the acceptor's hands, by the creditor of a payee or indorsee, will be effectual so long as the payee or indorsee remains *in titulo* of the bill; and perhaps the Act, by prohibiting all deeds in prejudice of prior diligence, may be held to restrain any indorsement which might render the arrestment ineffectual. *2dly*, This provision of the Act seems to apply, when the debtor gives a draft to a third party on a debtor of his, in whose hands one of his creditors was prepared to arrest the money due to him, had it not been previously assigned by intimation of the draft. This competition can only exist with regard to money, as it alone can be conveyed by such a draft (*a*). But, *3dly*, The Act has been considered as applying to all obligations on which the obligee may use diligence against the debtor's estate in prejudice of other diligence previously begun; in which view it must be held applicable, *inter alia*, to the granting or indorsing of bills or notes.

Leading points
of the enact-
ment.

The following are the leading points of the enactment, especially with reference to bills and notes:—

Its application
to moveables;

(1.) It is intended to protect diligence against moveables as well as against heritage, since it speaks expressly of “horning, *arrestment*, comprising, or other lawful means, duly to affect the dyvour's lands or goods,” or price thereof.

money
payments;

(2.) It does not strike against money payments by the bankrupt, since it is only intended to protect those funds which are attachable by diligence, whereas diligence cannot attach money in the bankrupt's possession (*b*). But the provision against “voluntary payments” was perhaps meant to denote payments made by giving away such effects as could otherwise have been attached by diligence. The word is thus applied, in an early case (*c*), to a transaction by which some sheep were transferred to a creditor in satisfaction of his debt.

acts in fraud
of prior dili-
gence;

(3.) The mere words of the Act, as they refer simply to the making of “any voluntary payment or *right* to any person, in

(*a*) *Antea*, p. 107.

(*b*) *Forbes v. Brebner*, 26 Jan. 1751, Kilk. 62; *Elchies*, No. 26, v. Bankrupt; 2 Bell, 201, note 4. The competency of poinding bank-notes in the debtor's

possession was questioned, but not decided, in *Alexander v. M'Lay*, 10 Feb. 1826, 4 S. 439. See *antea*, p. 123.

(*c*) *Tureddie v. Din*, 7 June 1713, M. 1037.

and of the lawful and more timely diligence of another creditor seem to apply to alienations of such funds only as would otherwise have been affected by the diligence (a); and, in that view, has reference to bills only in so far as the debtor's drafts or indorsements carry off his funds in the hands of third parties, which are *in cursu* of being attached by arrestment. It applies to such drafts or indorsements, though given in security of prior debts. And, besides, the Court has held deeds to be in defraud of diligence, bonds for illiquid debts, when they enable the grantee to follow diligence more speedily to the prejudice of other diligence previously commenced. On this ground (b) they reduced a bond of exoneration, granted to a creditor after a first adjudication had been made, though it only constituted the debt, and enabled the creditor to come *in pari passu* with the adjudger, which might have been done by a constitution, and by adjudging within year and day. This principle applies to all obligations, whether bonds or bills.

(c) when a debtor, after inhibition against him, granted a bill to a creditor merely in exchange for a former bill, the new bill, though afterwards made the ground of an adjudication, was sustained against an objection by the inhibiting creditor, on the ground that it did not constitute a new debt," but was "a renewed document of an old one," and did not place the creditor in a better situation than formerly.

(4.) The Act does not strike against bonds or bills for new debts, and new debts. the sale of lands or goods for a price instantly paid; these being transactions in the ordinary course of business, and the burden which they bring on the debtor's estate being compensated by the value given for them (d).

(5.) The diligence, "in defraud" of which the deed challenged is stated, must have been regularly begun before the deed, and must have timeously followed out. The Act assumes that the challenging creditor has "served inhibition, or used horning, arrestment, com-

Prior diligence must have been begun;

(c) Vide Mr Bell's remarks on this Act, ii. 203.

(d) *Dunbar's Creditors v. Grant*, 18 Dec. 1793, M. 1027. Vide also *Scott v. Bruce*, 19 Jan. 1788, mentioned by Bell, ii. 203, note 1.

(e) *Douglas, Heron, and Co. v. Brown*, 24 July 1785, M. 7070.

(d) This has been settled by a number of cases: *Veitch v. Pallat*, 11 Nov. 1675, M. 1029; *Nelson v. Ross*, 8 Feb. 1681, M. 1045; *Monteith v. Anderson*, 28 June 1665, M. 1044; and is also implied in *Bathgate v. Bowdoun*, 25 Jan. 1681, M. 1049. Vide also *Stair*, i. 9, 15; *Ersk.* iv. 1, 37.

prising," etc. It appears to be now settled, that diligence must be begun of that kind which is appropriate to the peculiar rights affected by the deed challenged (*a*). Thus, a deed which affects moveables only, cannot be challenged by a creditor who has used only inhibition. But if the deed affects heritage, an inhibition, though only executed, and not recorded, will be a sufficient ground for reducing it (*b*). It appears to be now almost settled, that horning, not being in general a necessary step of diligence against heritage, cannot authorize a challenge of rights which affect heritage only (*c*), unless when it is necessary as a warrant for adjudication (*d*). On the other hand, as horning is the initial step in a poinding, it warrants the challenge of all deeds affecting subjects which may be carried by poinding (*e*). The statute, indeed, mentions "horning" as one diligence which authorizes a challenge. But when the fund in question is only arrestable,—for instance, when the bankrupt gives a draft on a third party for a fund in his hands,—a horning affords no warrant for challenging the draft, because the proper diligence for attaching it is arrestment, which is competent without horning (*f*).

must be valid ;

The diligence begun must be free from fatal objections ; because otherwise, it is not diligence calculated, in terms of the Act, "duly to affect the dyvour's lands or goods," etc.

and timeously followed out.

The creditor must follow out his diligence *tempestive*, as the statute allows reduction only of the rights granted "in defraud of the lawful and *more timely* diligence of another creditor." It has been therefore decided, that a creditor lost the benefit of the statute by neglecting for five (*g*), or four months (*h*), or for a longer period (*i*), to follow out his diligence.

But, besides, it is necessary,—

(*a*) Ersk. iv. 1, 39 ; 2 Bell, 199, 200.

(*b*) 2 Bell, 200.

(*c*) Ersk. iv. 1, 39 ; 2 Bell, 200.

(*d*) *Murray v. Drummond*, 18 July 1677, M. 1048.

(*e*) Ersk. iv. 1, 39.

(*f*) *Vide* 2 Bell, 200.

(*g*) *Drummond v. Kennedy*, 9 July 1709, M. 1079.

(*h*) *Young v. Kirk*, Nov. 1688, M. 1078.

(*i*) *Duff v. Bell's Representatives*, 22 July 1742, M. 1059. It seems to have been implied in this case, that horning afforded a warrant for challenging the assignation of a debt, though the debt was only affectable by arrestment. But the creditor was held to have lost his right of challenge, by delaying for a number of years to follow up the horning with arrestment.

(6.) That the debtor's insolvency, at the date of the deed, should have been notorious, or the receiver of the deed privy to his fraud (a).

Debtor reputed bankrupt, or grantee privy to fraud.

The question, whether the challenge, if successful, accrues to the challenging creditor singly, or in common with other creditors, depends, in so far as regards moveables, on the principles already laid down with regard to the equalization of all diligences against moveables used within a certain period of bankruptcy (b). Its effect as to diligence against heritage depends on the rule regarding the *pari passu* preference of all adjudications used within year and day of the first effectual adjudication.

Who take benefit of reduction?

(7.) The clause in question merely enacts, that "the said dyvour or interposed person" (which person has been previously described as "their *interposed partakers of their fraud*") "shall be holden to make the same, viz. the subjects conveyed or their price, forthcoming to the creditor having used his first lawful diligence." These words seem to import that the challenge shall be personal against the bankrupt or the partakers of his fraud (which parties receiving deeds from him, under the circumstances provided against by the statute, are held to be), and there is no declaration of a total nullity of the right, even when transferred to third parties. The latest authority on this subject is hostile to such nullity (c). It may therefore be held that drafts and indorsements, or bills and notes, though falling under the Act, will be effectual to any subsequent indorsee, unless he is proved to have been privy to the bankrupt's fraud.

Deeds in hands of onerous *bona fide* assignee.

4. Act 1696, c. 5.

The statute 1696, c. 5, declares (on the debtor's bankruptcy 1696, c. 5. "being found, by the Lords of Session, at the instance of any of

(a) In *The Royal Bank v. Kennedy*, 24 Feb. 1709, M. 1057, the Court found the challenged right (which was an assignation) reducible, "unless the assignees would prove that, at the time of his (the debtor) granting the assignation, he was holden and reputed to be solvent." But in a subsequent case, *Tweddle v. Din and Others*, 7 June 1715, M. 1040-1, they threw the *onus probandi* on the challenging creditor, hold-

ing that denunciation with insolvency was not sufficient to found a challenge under the Act, "unless the common debtor had been commonly reputed bankrupt, or that the pursuer can qualify that the defenders were some way partakers of the fraud." This is nearly the doctrine laid down in the text.

(b) *Antea*, p. 499.

(c) 2 Bell, 204.

his just creditors"), "All and whatsoever voluntar dispositions, assignations, or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favours of his creditors, either for his satisfaction or farther security, in preference to other creditors, to be void and null."

Nature of
deeds chal-
lengeable.

(1.) The clause in question strikes against all dispositions, assignations, *or other deeds* granted by a bankrupt, at, after, or within sixty days before bankruptcy, in satisfaction or security of prior debts, and therefore applies to the indorsation of bills or notes, in security or satisfaction of debts; as they are assignations in terms of the Act. The delivery of such documents blank indorsed is also challengeable. Such delivery of bills is an assignment of funds in the drawee's hands; and, besides, the delivery of bills or notes for prior debts is included in the statutory expression "other deeds." A draft by the bankrupt on his debtor is also challengeable, as being an assignation of funds. Even the acceptance of a bill, or subscription of a note, for an illiquid debt, falls under the Act, being a security, inasmuch as the debt is thereby better secured than before.

Drawing or
indorsing of
bills.

In the first case of this kind, where an inland bill had been drawn by a debtor, in security of a prior debt, within sixty days of his bankruptcy, on a party who accepted (*a*), the Court set aside the bill, in a competition between the payee and the other creditors.

(*a*) *Durward v. Wilson*, 2 Feb. 1700, M. 1119. There are several cases decided about the same time, which Forbes notices shortly, 171-3, and which deserve to be perused, as illustrative of the state of the law at that time. The grounds of exemption from the statute given in *Durward v. Wilson* appear questionable, for the following reasons: 1st, A person holding a bill would not be obliged, in the ordinary case, to *prove* value received; because, though the bill does not, according to the Act 1621, instruct its onerous cause, if granted to a conjunct or confident person, instant value would be presumed in other cases. This point was decided in two cases, *Mansfield, Hunter, and Co. v. M'Ilmun*, 10 Mar. 1770, Morr. App.

to Bill, Part I. No. 2; and *Mansfield and Co. v. Douglas*, 11 Dec. 1770, *ibid.*, where the acceptor of a bill having suspended a charge on it by an onerous indorsee, on account of arrears in his hands by creditors of drawers, who had become bankrupt, and pleading that it might appear either that the bill had been indorsed to the holder within the sixty days, that he held it in trust for the drawer, the Court, in one case, remitted the Lord Ordinary on the Bills, that the suspension might be refused, the holder deponed that he had given present value for the bill; and in the other case refused the suspension *de plano*. 2dly, In order to make a bill or note challengeable under the Act 1696, the challenging creditor must

ing "bills included within the Act of Parliament, as well as assignments, *unless they bore value received, or so proven.*" The grounds of exception from the Act do not seem to be correct, the reasons stated below.

In the next case (*a*), the Court set aside the indorsation of a bill by a bankrupt within sixty days of his bankruptcy to a prior creditor, holding correctly that the Act 1696 takes place, if the creditor (the challenging creditor) "prove that the indorsation is in satisfaction or security of a prior debt, and not for present value received." The burden of proof was here laid, in terms of the Act, on the creditor; and, at the same time, it was implied that a proof, if adduced, would be effectual, whatever were the terms of the bill.

In the next case (*b*), which involved also a question as to the validity of a bill blank in the drawer's name, the Court, with reference to an objection against the indorsation as granted in security of a prior debt, set it aside in as far as it had been so granted.

The Court also (*c*) set aside the indorsation of a bill granted by a debtor to one of his creditors within sixty days of bankruptcy, though the indorsation was accompanied with a reservation, to be afterwards cashed. The rule was confirmed in many other cases; for instance, in several cases (*d*), where the indorsations of bills, so far as in security of prior debts, were set aside. In another case (*e*), where a

bill was granted in security of satisfaction of a prior debt. *3dly*, if it is proved, it will not, as the question in question seems to imply, be sufficient, that the bill bears to be "value received," since these words are intended to cover the fraud which it is the purpose of the statute to protect. But the decision was correct, in so far as it set aside the bill. The Court, in noticing this case, says the decision was influenced by the circumstance of the person who drew the bill being the drawer's nephew. This circumstance would now be suf-

ficient in itself to have warranted a setting aside of the bill under the Act unless value was proved to have been given for it. But from several cases cited by Forbes, 173-4, it

appears that, in his time, the mere statement in a bill of "value received" would, in the ordinary case, have superseded the necessity of proving value in questions under the Act 1621, although the words "value in account" would not have done so. See *Morrison v. Carron Co.*, 1854, *antea*, p. 304, n. (*a*).

(*a*) *Campbell v. Graham*, 16 Jan. 1713, M. 1120.

(*b*) *Nelson v. Russell*, 14 Feb. 1734, M. 1435, 1508, 1685.

(*c*) *Campbell v. M'Gibbon*, 10 Aug. 1780, M. 1139.

(*d*) *Robertson v. Ogilvy*, 21 Nov. 1798, *Morr. App. to Bill*, 8; *Blaikie v. Wilson*, 1 July 1803; 2 Bell, 211, n. 6.

(*e*) *Neil v. Forrester*, 14 June 1815, F. C.

that the purpose of this transaction had been to give a preference which the other creditors would not have obtained if the p~~re~~ference had been completed, the Court apportioned among them, as if such a preference had been completed. In a later case (a), a draft in security of a debt of a drawer to a third party was set aside, though the draft was for instant value, inasmuch as it was given up in consideration of it. The application of the statute to the drawing or indorsation of bills is settled (b).

Delivery of
bills blank
indorsed.

The statute is equally applicable to delivery of bills or notes blank indorsed. In one case (c) it was decided that the mere deposition of a bill, without indorsement, in security of a prior debt, followed by its delivery to the creditor, was challengeable under the Act. In that case the bankrupt had deposited the bill with his creditor, and the creditor had delivered it up on payment of the debt; and the bill was paid by the acceptor, who placed L.160 in the account, and the residue to the bankrupt's account. The bill had been indorsed by the bankrupt; but it did not appear whether indorsement had been made at the time of the deposit or afterwards. Some of the Court held that the bill being indorsed at the time of deposit the statute was undoubtedly applicable, in their decisions. But they held, besides, that the deposit and subsequent payment, formed parts of one scheme *dum legi*, by securing a preference, and that the payment of the debt, but a "deed" for "satisfaction."

bills or notes blank indorsed falls under the Act, since it vests a complete right, and is therefore a security from the time when it is made.

Indorsement or delivery by the bankrupt of a bill or note, accepted or granted for his accommodation, is not challengeable under the Act 1696, as it provides only against deeds granted "in satisfaction or further security, in preference to other creditors;" thus indicating that the deed must tend to carry off some actual fund. But if the creditor receiving an accommodation-bill or note recovers payment under it, his claim is *pro tanto* extinguished, while the accommodation-acceptor's claim of indemnity is substituted; so that the estate neither gains nor loses (a). If the document had remained in the bankrupt's hands, it would have been unavailable either to him or his creditors. The same rule has been adopted in England. There, when a debtor commits an act of bankruptcy, the interest in his estate is vested in the assignees appointed under a commission of bankruptcy issued against him; and this judicial transference draws back to the date of the first act of bankruptcy: so that, under certain exceptions in favour of acts in the ordinary course of trade, all alienations of his property, or deeds by which it may be burdened, and consequently all indorsations of bills due to him (b) after the first act of bankruptcy, are challengeable by his assignees. But it has been decided (c), that the indorsement by him to a creditor, after an act of bankruptcy, of a bill accepted for his accommodation, is available to the indorsee against the acceptor, seeing the assignees have no good interest to set it aside.

In another case (d), a person having taken from his debtor, after the latter had, without his knowledge, committed a secret act of bankruptcy, an indorsement, in security of his debt, to an acceptance by a third party in the bankrupt's favour, the indorsee was held to have no claim under the indorsement, so far as the bill was accepted for value of the drawer in the acceptor's hands; because, from the date of the former's act of bankruptcy, that value,

Accommodation-bills.

(a) 2 Bell, 210.

122; *Wallace v. Hardacre*, 1807, 1

(b) *Smith v. De Witts*, 6 D. and R.

Camp. 46-7, *per* Lord Ellenborough.

120.

(d) *Willis v. Freeman*, 1810, 12

(c) *Arden v. Watkins*, 1803, 3 East.

East. 656.

as forming part of his estate, was vested in his assignees; but that, so far as it was accepted for his accommodation, neither the bankrupt nor his assignees had any interest to dispute the indorsee's right to it, since it could not be available to them. The Court also laid down the doctrine already stated, that, though the acceptor should claim indemnity from the bankrupt's estate, in so far as he was obliged to pay the bill for the bankrupt's accommodation, this would create no new burden against the estate, because his claim would come in place of that of the indorsee. On the other hand, when a bill has been accepted, in consideration of a cross bill accepted by the bankrupt for the drawer's behoof, the bill thus accepted cannot be indorsed by the bankrupt, because it forms a good ground of claim to his assignees against the acceptor's estate (a). The same ground of objection would exist in Scotland under the Act 1696.

The indorsement of an accommodation-bill would be challengeable under the statute, when the party accepting it for the bankrupt's accommodation obtained, for his indemnity, a security over the bankrupt's estate. Such an indorsement injures the estate, inasmuch as the acceptor will indemnify himself from the security, so far as he pays the bill, so that the creditor will indirectly get the benefit of the security. Such a case was lately decided against the security (b), in a reduction of a bill drawn by a debtor upon, and accepted by, his son, in security of two bills due by the father to a bank, the son having previously received for his indemnity an heritable bond from his father, on which he was infeft. The bill was held, under these circumstances, to be a security by the bankrupt in preference to the other creditors.

Bills or notes
granted for
previous debts.

The acceptance of a bill or subscription of a note, by the bankrupt, in favour of a creditor, if it improves his situation,—e.g. by giving him a liquid document for an illiquid debt,—falls within the statute, being truly a deed for the creditor's "further security in preference to other creditors." The Court was once of a different opinion. Thus (c), where a bill had been protested for non-pay-

(a) 1 Camp. 179, note to *Kent v. Lowen*.

(b) *Duncan's Trustees v. Low*, 11 Dec. 1822, 2 S. 77.

(c) *Cowan v. Mansfield's Trustees*, 7 Jan. 1762, M. 1167.

ment, it was decided that a new bill granted to the holder by an indorser, not only for the principal sum contained in the first bill, but for the interest, re-exchange, and charges incurred on it, did not fall under the Act 1696, though given within sixty days of the granter's bankruptcy. But it undoubtedly gave him "further security," in so far as regarded the interest, re-exchange, and charges on the former bill, which were otherwise unliquidated. In another case (a), it was pleaded, *inter alia*, that a promissory-note granted by a bankrupt to one of his creditors, within sixty days of bankruptcy, fell under the Act 1696, as it enabled the creditor to rank more than once for the same debt; viz. first on the estate of the bankrupt who granted it; and, secondly, on the estate of a third party who had indorsed it in consideration of a security given him by the bankrupt. But this plea is said to have been disregarded. But a different rule was adopted, after full discussion, in a subsequent case (b), which related to the validity of a bond of corroboration granted within sixty days of the granter's bankruptcy, *first*, for debts due to the grantee's father, which therefore the grantee could not have acquired without confirmation; *secondly*, for debts of which the term of payment had not arrived; and, *thirdly*, for accumulations of principal, interest, and expenses on the debts. It was admitted that this bond was challengeable so far as the debt was enlarged by it, or a penalty superadded, beyond what was due by law; and it was at last agreed, that even accumulations which did not arise *ipso jure*, e.g. the accumulation of interest on interest, must be struck off. But the majority of the Court further decided that the bond, even as to the principal debt, was challengeable *in toto*, inasmuch as it gave the grantee a preference over the other creditors, by enabling him to proceed more rapidly with diligence. This doctrine was confirmed in a case (c), where a person having granted a bond of corroboration within sixty days of his bankruptcy, accumulating into one sum bearing interest, *1st*, a bill on which no diligence had followed; *2dly*, a bond in

(a) *Swinton's Trustee v. Sir William Forbes and Co.*, 19 Feb. 1790, M. 1181.

(b) *M'Math v. M'Kellar's Trustee*, 1 Mar. 1791, M. 1114, where the Faculty report of the case is given.

But the grounds of judgment are more fully explained by Mr Bell, ii. 213, note 1.

(c) *Dunbar's Creditors v Grant*, 18 June 1793, M. 1027.

which the grantee of the bond of corroboration was his cautioner; and, 3dly, a bond and bill in which the latter was really cautioner, though *ex facie* of the documents he was joint obligant (the three last of these debts having been also paid by him), the Court reduced the bond of corroboration *in toto*, holding “that a bankrupt ought to execute no deed by which the situation of his creditors is affected, and that it would be dangerous to support any deed of that nature.” Though these two decisions did not relate to bills or notes, their principle is applicable to such documents, when they give the grantee a greater advantage over the other creditors than he had before. This will not generally be the effect of a bill or note granted as a substitute for a former bill or note, unless the former document has been due for more than six months without recording a protest, in which case the substituted bill or note would probably be reducible, as giving the grantee the benefit of summary diligence, which he had lost on the first document (a).

Securities
granted in
terms of a
prior obliga-
tion to do so.

‘After some fluctuation of the decisions (b) upon the question, it is now considered to be settled (c), in the language of Lord Brougham (d), that “it is not sufficient to protect a transaction from the operation of the Act 1696, that money has been advanced on a promise or obligation to grant a security for it, where the security is actually granted within sixty days of bankruptcy.” This doctrine applies to the case of the security not being granted at the time of the advance. If the security is granted *unico contextu* with the advance, though within the sixty days, it is not reducible under the Act 1696, as it is not granted for a prior debt.’

Exceptions.

(2.) There are several transactions as to bills or notes which have been exempted from the Act, though some of them would appear at first to fall under it.

Payments of
debts due;

It has been already shown (e), that payments made by a bankrupt on account of debts fallen due are in general valid, as they form a necessary part of the debtor’s administration of his own affairs. The words of the Act 1696, c. 5, indicate that it is appli-

(a) 2 Bell, 213-4.

(b) See *Cranstoun v. Bontine*, 6 July 1832, 6 W. and S. App. 79; and *Anderson v. Walker*, 29 Mar. 1842, 4 D. 1180. *Horne v. Hay*, 12 Feb. 1847, 9 D. 651.

(c) *Moncrieff v. Union Bank*, 16 Dec. 1851, 14 D. 200.

(d) *Inglis v. Mansfield*, 10 April 1835, 1 S. and M’L. Ap. 203.

(e) *Antea*, p. 501.

cable only to deeds of preference granted for the creditor's "satisfaction or further security," not to payments, by which the debt is extinguished. The only question on this subject has been, whether, besides cash payments, the practice of trade does not also sanction, to a certain extent, payments by bills or notes.

First, Though navy bills, bank-notes, or bankers' notes in common circulation are not properly cash, yet, if they are generally received as such, the delivery of them in payment will be held payment in cash.

Secondly, Even the acceptance of bills, indorsation of bills or notes, delivery of them blank indorsed, or the granting of drafts, will be sanctioned as payments, if they are given as such, and agreeably to the usual mode of making payments in the course of trade. The Act 1696 does not strike against drafts or indorsations *nominatim*, but only so far as they give the favoured creditor "satisfaction, or further security," in preference to other creditors; and therefore it does not apply to them when given only in payment. No doubt, though such documents should be given in payment of a debt, and the creditor should discharge it on receiving them, the discharge is still conditional; so that, if they turn out bad, the claim will revive. But they are payments in the contemplation of the parties, as much as by navy bills or the notes of banking companies, which are liable to the same contingency.

Although the doctrine now explained was once disputed, it is now quite settled. *1st*, It has been decided, that payments or remittances to a current account between merchants, or between a banker and his customer, by cash or bills, are effectual, whether the balance is for or against the party making the remittance, which can be held only on the ground that remittances by bills are payments (*a*). *2d*, It follows, *a fortiori*, and is also settled, that the indorsation of a bill for the purpose of being discounted, and its proceeds applied in payment of a single debt, does not fall

(*a*) *Stein's Trustee v. Sir William Forbes and Co.*, 1 Mar. 1791, M. 1142; 2 Bell, 218, note 4; *Sandieman and Graham's Trustee*, 1792, 1 Bell's Cases, 81, and 16 Nov. 1790, M. 14111; *Richmond and Freebairn's Trustee v. Peli-*

can Insurance Office, 26 June 1805, Morr. App. Bankrupt, No. 24, 2 Bell, 218, note 4; *Dundas v. Smith*, 2 June 1808, Morr. App. *h. t.* No. 28; *Dickson, Langdale, and Co. v. Cowan*, 3 Dec. 1828, 7 S. 132.

under the Act 1696 (*a*); or the payment of a bill past due by a draft on London at twenty-five days, when drafts at par were at twenty days (*b*); or the payment of a debt *pro tanto* by a check on a banker, or a bill at a discountable date, settling the difference in cash (*c*); or a bill given and received as cash, in payment of goods delivered (*d*). These points may be considered as now ascertained (*e*).

provided such
payments be
bona fide.

But this doctrine applies only to transactions intended *bona fide* as payments; and, therefore, when the real intention of parties is to grant a security, the transaction will be reducible. Thus, when a person makes an advance to a trader, and on the day of the advance obtains from him a deposit of bills, in consequence of an alarm about his solvency, this is a security for a prior debt, not a payment, as the creditor would not exact payment of the advance on the very day of making it (*f*). Indeed, knowledge of the debtor's insolvency is sufficient *per se* to vitiate the transaction. The giving also of a bill at a distant date will be considered as a security, as bills cannot be regarded in mercantile construction as payments, unless payable at discountable dates. The giving, too, of a promissory-note will be challengeable, as it does not proceed, like the indorsement of a bill, on the assumption that there are

(*a*) *Jamieson v. Ferrier*, 23 Jan. 1810, 2 Bell, 218, note 1. In *Brierly v. Mackintosh*, 19 Feb. 1846, 5 Bell, Ap. 1, there was a similar point. A. was entitled to L.1000 from X., but was due B. L.200. It was arranged in writing that A. should draw a bill on X. for the L.1000, in favour of C., who should pay B. his L.200, and account to A. for the balance. Within sixty days of this arrangement A. became bankrupt. Before the bankruptcy C. had received the L.1000, and had paid L.50 to B. He paid the remainder to A.'s trustee. It was held, in a question with B., that he was not justified in doing so, as the transaction was not struck at by the Act 1696, it being the same as if A. had himself received the L.1000 in cash, and then paid B. his L.200.

(*b*) *Ferrier v. Newton*, 2 June 1808, 2 Bell, 218, note 2; which compare with

opinion as to bank bills, in *Campbell v. M'Gibbon*, 10 Aug. 1780, M. 1139.

(*c*) 2 Bell, 218, note 4; *Hawkins v. Penfold*, 2 Vesey, 550.

(*d*) *Watson v. Young*, 1 Mar. 1826, 4 S. 507.

(*e*) The changes of opinion on this subject are indicated by some of the earlier cases, as *Campbell v. M'Gibbon*, note (*b*), and 2 Bell, 217, note 3; and *M'Hutcheon v. Welsh*, 20 May 1794, 2 Bell, 217, note 4, compared with the later decisions now cited.

(*f*) *Vide Hotchkis v. The Royal Bank*, July 1796, 2 Bell, 219, note 4, where the Court are said, under the circumstances stated in the text, to have held that the deposit of bills was challengeable as a security for a prior debt. The case was not finally decided, as the bank gave up the bills in consequence of this opinion of the Court.

funds in the acceptor's hands; but it is an expedient to gain indulgence, and the note, if discounted, must be so on the granter's credit, *being a security over his estate*. It has been also found in England (a), that, when a party for whose accommodation certain bills had been drawn, sent money to the drawer, after he had committed an act of bankruptcy, and before they became due, to take them up, this was not a payment in the ordinary course of business. In Scotland, it would be accounted a deposit in security of the drawer's claim of relief, and would therefore be reducible under the Act 1696 (b). This doctrine was recognised in a case, where a provision made for payment of a bill before it became due, by lodging with the indorser the price of some heritable property sold by the bankrupt to raise money, was, after a contrary decision by the Court of Session, ultimately decided, in conformity with a special remit from the House of Lords, to be reducible under the Act 1696 (c).

A similar decision has been given regarding the application of bills and orders remitted by a person, within sixty days of his bankruptcy, to his ordinary bankers, to the payment of different instalments of a bond due by him to them; it being held that such remittances, in the ordinary course of business, were valid, and might be applied by the bankers as cash, to pay instalments of the bond which were past due; but that, as to an instalment not yet due, they could not be applied to it, by an order from the bankrupt, without falling under the Act 1696, as a provision or security (d). As to the question, however, whether the funds in their hands might be retained by them in security of that instalment, it was held ultimately to depend on the matter of fact, whether these funds had been lodged in the ordinary course of business, or with a special view to the security of the third instalment; and on that point an inquiry was ordered (e), which terminated against the bankers (f). Certain other funds and bills were held to have been

(a) *Tamplin v. Diggins*, 2 Camp. 311, *per* Lord Ellenborough.

(b) See Lord Ardmillan's note in *Guild v. Orr, Ewing, and Co.*, 9 Nov. 1857, 20 D. 3, from which it appears that he had held that a payment of bill or note, before it falls due, is reducible under the Act 1696.

(c) *Speir v. Dunlop*, 15 June 1825, 4 S. 92; 22 May 1826, 2 W. S. 253; 30 May 1827, 5 S. 729.

(d) *Pattison v. Allan*, 3 Dec. 1828, 7 S. 144.

(e) *Ibid.*, 12 June 1829, 7 S. 753.

(f) *Ibid.*, 5 Murray's Reports, 231, 9 S. 317.

then pleaded compensation against the price on the accommodation-bill which he had been obliged to retire, the Court, though contrary to the opinion of Lord Gillies, Ordinary, held that the transaction was not challengeable, and sustained the plea of compensation. The bankrupt was here a direct party to the transaction by which the only other party, one of his own creditors, was benefited. But the Court seems to have held that the sale was made *bona fide*, and that the security was merely a consequence flowing incidentally from it. The same remark is applicable to the preceding case, with this addition, that the bankrupt did not appear in it to have been a party to the preference. If it had been proved, in the last case, that the sale was merely a device to conceal the real purpose of granting a security, the transaction must have been set aside, as falling under the Act.

In a case (*a*), where a debtor had been released from imprisonment by his creditor, for the purpose of validating a sale by him to a third party, made in order to obtain a bill for the price, which he immediately delivered to the creditor's agent, after which the creditor's name was filled up as drawer, the amount of this bill, after it had been paid, was recovered back, on the ground that it had been truly granted as a security by the debtor to this creditor, to the prejudice of his estate and of the other creditors. The creditor endeavoured to show that the bankrupt estate had not been injured, as the purchaser had not got credit for the payment against the estate. But the contrary was established; and therefore, though the purchaser was not proved to be implicated, the transaction, as between the bankrupt and the creditor's agent, or, in other words, with the creditor, was clearly a security under the Act 1696. A similar decision was given in another case, where this case was recognised as an authority (*b*); and also in a case where a party, who was bound to retire a bill accepted for his accommodation, and which was past due and protested, sold some horses to the acceptor, five days before his sequestration, and applied the price in retiring the bill (*c*). In another case (*d*), already alluded to, the sale of a

(*a*) *Barbour v. Johnston*, 30 May 1823, 2 S. 351.

(*b*) *Ramsay v. Kirkwood*, 11 June 1829, 7 S. 749.

(*c*) *Stewart v. Scott*, 4 Dec. 1832, 11 S. 171.

(*d*) *Speir v. Dunlop*, 15 June 1825, 4 S. 92; 22 May 1826, 2 W. S. 253; and 30 May 1827, 5 S. 729.

property by the bankrupt, to raise money as a provision for paying a debt before it was due, though the creditor receiving it had no concern in the sale, was ultimately, after a special remit from the House of Lords, held to be reducible under the Act 1696. In another case (*a*), where a party, who had a cash-credit with a bank, on the security of two cautioners, sold a house and land within sixty days of his bankruptcy, with the assistance of one of the cautioners, after saying that he wished to do so, to pay up his cash-account, and gave the cautioner an order for the price, which the latter paid into the credit of the cash-account, the Court, although it was not proved that this cautioner knew of the debtor's insolvency, or that the purchaser or other cautioner knew the purpose of the transaction, held that it was intended to give the cautioners a preference, contrary to the Act 1696, and therefore reduced it with regard to them.

Bills or notes granted or transferred in consideration of debts contracted at the time of transference, do not fall under the Act 1696. That Act strikes against deeds granted to creditors for their satisfaction or security "in preference to other creditors;" thus implying, that all parties were creditors before the date of the deed; and therefore it does not refer to debts contracted at the date of the deed, and in consideration of it. It relates, indeed, solely to deeds granted for the "satisfaction or further security" of debts; thus assuming that the debts have a separate existence, not that they are created by the deed which constitutes the security. Besides, the bankrupt does not here burden his estate or lessen its value, but gives a security for a full consideration, which may be applied to the benefit of his creditors. Accordingly (*b*), where the indorsation of a bill was challenged under the Act, the Court, while they set it aside, as granted in security of a prior debt, held that it would have been valid if given for present value received. This doctrine has been held repeatedly as to other deeds granted for *nova debita*, but which are in the same situation on this point with bills and notes (*c*). The same doctrine seems applicable to debts con-

or for other
new debts.

(*a*) *Mitchell v. Rodger*, 26 June 1834, 12 S. 802.

(*b*) *Campbell v. Graham*, 16 Jan. 1713, M. 1120.

(*c*) The doctrine is implied, for instance, in *Johnston v. Home*, 29 Jan. 1751, Morr. 1130; but, indeed, it is nowhere disputed.

creditor in a bill had executed a poinding of his debtor's goods, and obtained a warrant of sale, but before the sale the debtor had sold the goods privately, and taken a bill for the price, which he indorsed to the poinding creditor in security of the former bill, the indorsation was reduced under the Act 1696; and as it was held that the purpose of this transaction had been to defeat the *pari passu* preference which the other creditors would have obtained if the poinding had been completed, the Court ordered the fund to be apportioned among them, as if such a preference had taken effect. In a later case (a), a draft in security of a former bill due by the drawer to a third party was set aside, though it was pleaded that the draft was for instant value, inasmuch as the first bill had been given up in consideration of it. The application of the statute, therefore, to the drawing or indorsation of bills and notes, is fully settled (b).

Delivery of
bills blank
indorsed.

The statute is equally applicable to delivery, by the bankrupt, of bills or notes blank indorsed. In one case (c), it was even decided that the mere deposition of a bill, with or without indorsation, in security of a prior debt, followed by payment of part of it to the creditor, was challengeable under the Act 1696. The bankrupt had deposited the bill with his creditor, on a receipt agreeing to deliver it up on payment of the debt; and subsequently, the bill was paid by the acceptor, who placed L.160 of it to the creditor's account, and the residue to the bankrupt's account. The bills had been indorsed by the bankrupt; but it did not appear whether the indorsement had been made at the time of the original deposition or afterwards. Some of the Court held that there was evidence of the bill being indorsed at the time of deposition; and in that case the statute was undoubtedly applicable, in terms of the foregoing decisions. But they held, besides, that the deposition, with subsequent payment, formed parts of one scheme *ad fraudem faciendam legi*, by securing a preference, and that it was not a direct payment of the debt, but a "deed" for "satisfaction or further security" of it. This decision proves, *a fortiori*, that delivery of

(a) *Ritchie v. Wyllie*, 27 Nov. 1821, 1 S. 199.

(b) *White v. Briggs*, 8 June 1843, 5 D. 1148.

(c) *Manson v. Angus*, 16 July 1771, Morr. App. to Bankrupt, 16; affirmed on appeal, 22 Mar. 1774, 2 Pat. App. 336.

bills or notes blank indorsed falls under the Act, since it vests a complete right, and is therefore a security from the time when it is made.

Indorsement or delivery by the bankrupt of a bill or note, accepted or granted for his accommodation, is not challengeable under the Act 1696, as it provides only against deeds granted "in satisfaction or further security, in preference to other creditors;" thus indicating that the deed must tend to carry off some actual fund. But if the creditor receiving an accommodation-bill or note recovers payment under it, his claim is *pro tanto* extinguished, while the accommodation-acceptor's claim of indemnity is substituted; so that the estate neither gains nor loses (*a*). If the document had remained in the bankrupt's hands, it would have been unavailable either to him or his creditors. The same rule has been adopted in England. There, when a debtor commits an act of bankruptcy, the interest in his estate is vested in the assignees appointed under a commission of bankruptcy issued against him; and this judicial transference draws back to the date of the first act of bankruptcy: so that, under certain exceptions in favour of acts in the ordinary course of trade, all alienations of his property, or deeds by which it may be burdened, and consequently all indorsations of bills due to him (*b*) after the first act of bankruptcy, are challengeable by his assignees. But it has been decided (*c*), that the indorsement by him to a creditor, after an act of bankruptcy, of a bill accepted for his accommodation, is available to the indorsee against the acceptor, seeing the assignees have no good interest to set it aside.

In another case (*d*), a person having taken from his debtor, after the latter had, without his knowledge, committed a secret act of bankruptcy, an indorsement, in security of his debt, to an acceptance by a third party in the bankrupt's favour, the indorsee was held to have no claim under the indorsement, so far as the bill was accepted for value of the drawer in the acceptor's hands; because, from the date of the former's act of bankruptcy, that value,

(*a*) 2 Bell, 210.

122; *Wallace v. Hardacre*, 1807, 1

(*b*) *Smith v. De Witts*, 6 D. and R.

Camp. 46-7, *per* Lord Ellenborough.

120.

(*d*) *Willis v. Freeman*, 1810, 12

(*c*) *Arden v. Watkins*, 1803, 3 East.

East. 656.

said that the Court would also have set it aside, and they are reported to have considered it bad in two subsequent cases (a). It may be doubted, however, whether the promissory-note could be sustained if the vendition was reduced. Neither of them fell under the strict terms of the Act 1696, since the note was a security granted to the creditor, not by the debtor, but by a third party, and the vendition was a security granted to a third party, not to the creditor. Neither of them could be challenged, unless as forming parts of a scheme to evade the Act 1696, by granting, under a false name, what was really a security to the creditor. But this ground of challenge applied equally to the promissory-note and to the vendition; and therefore if the bankers, through their agent, were privy to the scheme, the note seems to have been reducible as well as the vendition.

In a later case (b), where a debtor, threatened with personal diligence by his creditor, had, on condition of the creditor superseding diligence, granted him one bond of corroboration for the debt signed by his brother and partner, and another signed by his two brothers-in-law, whereupon the debtor gave his brothers-in-law an heritable bond of relief (which referred to their cautionary obligation) for part of the amount, over his house, the Court, holding, notwithstanding certain objections which need not be detailed at present, that the bond of corroboration and bond of relief were parts of the same transaction, sustained the bond of relief against a reduction by the creditors. It was held by the majority of the Court, that the parties had no suspicion of the debtor's approaching bankruptcy, and intended no evasion of the statute; and the bond of relief was considered as not falling under the statute, being granted for a *novum debitum* as to the cautioners. The minority, on the other hand, seem to have considered the Act as applicable, on the ground of a constructive accession by the cautioners to the scheme of rendering their obligation the means of giving a security to a prior creditor. But the statute was not applicable unless there had been proof of their accession.

(a) 2 Bell, 227, text, and note 1.

(b) *Monteath's Trustee v. Douglas and Others*, 12 Dec. 1794, M. 1146. Mr Bell, ii. 227, note 2, gives a fuller

detail of the opinions of the Court in this case than is given in the printed report.

(3.) The rule of the Act 1696, regarding the date of such deeds as fall under it, including those which relate to bills and notes, is, that they shall be "made and granted" within sixty days of the grantor's bankruptcy. It remains to be considered, 1st, How the sixty days are to be reckoned back from the bankruptcy to the date of the deed challenged? and, 2dly, When the deed is held to be completed?

Date of deeds challengeable.

In reckoning the sixty days, 1st, It is settled by a judgment of the House of Lords, in an analogous case regarding the computation of sixty days, within which a deed on deathbed affecting heritage is challengeable (a), that this period must be reckoned exclusive of the day of death or bankruptcy; 2dly, The days do not run from noon to noon, but from midnight to midnight, viz. from the midnight immediately preceding the bankruptcy to the sixtieth midnight previous (b); 3dly, A deed executed on any part of the sixtieth day is held to be beyond the sixty days, on the principle, *Dies inceptus pro completo habetur* (c). This was held (d) regarding the indorsation of a bill which had been made on 31st March, the debtor, as was alleged, having been rendered bankrupt on 30th May following. The Court, besides finding that the bankruptcy had not taken place, held that the indorsation would, at any rate, have been valid, as being granted on the sixtieth free day before the alleged bankruptcy. The same rule was adopted (e) regarding the preference of an arrestment used on the sixtieth free day before the date of a bankrupt's sequestration.

How the sixty days computed.

In regard to the time when the deed is to be held as "made and granted," the Act provides, that "dispositions, heritable bonds, or other heritable rights whereupon infestment may follow, . . . shall only be reckoned, as to this case of bankrupt, to be of the date of the sasine lawfully taken thereon" (f). 'This enactment not being sufficiently explicit and comprehensive, the Bankruptcy Act (g) provides, that the date of a deed under it, "or under the Act 1696, c. 5, shall be the date of recording the sasine,

Time when deeds held as completed.

(a) *Sir John Ogilvie v. Mercer*, 10 Dec. 1793, M. 3336.

(b) 2 Bell, 179, note 4, and cases therein cited.

(c) *Scott v. Rutherford*, 7 Dec. 1839, 2 D. 206.

(d) *Blaikie v. Clegg*, 21 Jan. 1809, F. C.

(e) *Anderson v. Starkie*, 2 Mar. 1813, F. C.

(f) 2 Bell, 229-30.

(g) 19 & 20 Vict. c. 79, § 6.

where sasine is requisite, and, in other cases, of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall in the particular case be requisite for rendering such deed completely effectual.”’

Application of
this to bills or
notes.

According to this enactment, drafts by the debtor, in security of a prior debt, considered as assignments of the funds in the drawee's hands, must be reckoned as of the date of intimation to him; that is, of presentment, as proved by acceptance, or, in case of non-acceptance, by protest, or other *habile* evidence (*a*), since it is from that date that they become effectual as assignments. If such drafts are accepted, but the acceptance bears no precise date, it will in general be presumed to be of the same date with the draft (*b*), though such a presumption may, in questions under the Act 1696, be redargued by contrary evidence. Indorsations of accepted bills, or of unaccepted drafts duly presented, require no separate intimation to the drawee, but form effectual assignments (*c*) of the drawer's funds in the drawee's hands, in the first of these cases, when made at any time after the date of acceptance, and in the latter case, when made after the date of presentment. But they are not effectual till delivery of the bill (*d*), and therefore, in terms of the clause now quoted, the date of delivery, if ascertained, will be held to be their true date. When there is no separate evidence of the date of delivery, the date of indorsation, as appearing on the bill, unless disproved, will be held to be its true date, as an assignment of the funds in the drawee's hands. This rule applies also to blank indorsations. If the indorsation has no separate date, it will be presumed to be that of drawing the bill (*e*); and unless the bill is proved to have been indorsed or delivered on a different date, its efficacy as an assignment will, like that of the original draft, be computed from the time of acceptance or presentment.

Drafts, as obligations by the drawer, are held, in questions under the Act 1696, to be of the date which they bear, unless proved to have been delivered on a different date. The same rule is followed as to the date of promissory-notes, when challenged

(*a*) *Antea*, p. 104.

(*b*) *Antea*, p. 216.

(*c*) *Antea*, p. 104.

(*d*) *Antea*, p. 89.

(*e*) *Antea*, p. 177.

under the Act 1696, as securities for prior debts. Acceptances by the debtor, when challenged on the same ground, are presumed to be of the date which they bear, unless proved to have been delivered on a different date; and if they bear no separate date, they are held, unless the contrary is proved, to be of the date of the bill.

(4.) The person challenging must be a creditor of the bankrupt, or in right of a creditor, as a trustee appointed by creditors, or interim factor or trustee on the debtor's sequestrated estate, or even the bankrupt himself after he has concluded a composition-contract with his creditors, since he thereby acquires those rights belonging to the estate which were previously vested in the creditors (*a*). One of two acceptors of a bill cannot bring a reduction of a preference granted by the other acceptor, founding on his possession of the bill retired, because it is thus extinguished; and the presumption is, that it was retired by both acceptors. He can have no title, in such a case, without a decree of relief and constitution against the other acceptor (*b*).

Who may challenge under the Act 1696, c. 5?

The principal question on this subject has been, whether the challenge may be brought by any creditor, or only by those who were creditors before the date of the deed challenged. In the only two cases which have occurred, the Court restricted the right of challenge to prior creditors (*c*). The Act appears to favour this conclusion; for, although it provides generally that a declarator of bankrupt may be brought by "any of his just creditors," yet the only deeds which it declares to be challengeable are those granted "in favour of his creditors, either for his satisfaction or further security, *in preference to other creditors*." But a deed cannot be said, in correct language, to give one creditor a preference over another creditor, unless both are creditors at the date of the deed. Indeed, the Act has been construed to include only preferences to prior creditors; and therefore, as these are designated generally as

Prior creditors.

(*a*) In *Drummond v. Watson*, 29 Jan. 1850, 12 D. 604, the title of sequestrated bankrupt discharged on composition was sustained in the Outer House, and no appeal was taken on this point. In the Inner House doubts were expressed in regard to it.

(*b*) *Bett v. Arnott*, 27 June 1828, 6 S. 1021.

(*c*) *Mann v. Walls*, 25 July 1702, M. 1006; *Robertson Barclay v. Lennox*, 19 Nov. 1783, as reported by Mr Bell, ii. 209, note 2.

creditors, the other creditors to whom they are said to be preferred, being designated in the same way, must be also held to mean prior creditors. These seem, therefore, to be the only creditors who can bring the challenge, as they alone are declared to be injured by the challengeable deed. An opposite construction, however, has been adopted by a learned author (*a*); and there can be no doubt, for the reasons which he states, that it would be expedient, and conformable with that principle of equality which it is the purpose of the bankrupt law to introduce, to extend the right of challenge to all who were creditors at the time of the debtor's bankruptcy (*b*).

Form of the
action.

(5.) According to the Act, it is necessary first to establish the debtor's bankruptcy by a declarator, and the nullity of the deeds challenged is then made to follow as a consequence from the declarator. But the usual form is to bring a combined action of declarator, reduction, and repetition, libelling specially on the statutes, subsuming the bankruptcy and the particulars of the deed challenged, calling for production of it, if in the form of a written deed, under the certification of nullity, and concluding for reduction of it, and for repetition of the fund alienated by means of it (*c*). This process is peculiar to the Court of Session. 'Such a deed may also be set aside by way of exception, and it seems competent to challenge such a deed in an ordinary action in the Sheriff Court (*d*).'

Effect of
reduction.

(6.) One effect of the reduction is, to set aside any deed falling under the Act 1696, so far as the interest of the creditors injured by it is concerned. But it is not therefore null to any other effect. In one case (*e*), where a debtor, after horning had been raised against him by one of his creditors, granted a bill for the supposed amount of all his debts to a trustee for behoof of his whole creditors, who then rendered him bankrupt on this bill, the creditor who had previously raised diligence succeeded in reducing the bill, as a security granted within sixty days of bankruptcy; and yet the same bill was sustained as a valid ground for the diligence which produced bankruptcy, the Court holding that it was good against

(*a*) 2 Bell, 208 and 232.

(*d*) 19 & 20 Vict. c. 79, § 10; 20

(*b*) Under the 19 & 20 Vict. c. 79, § 11, the trustee on a sequestrated estate may now challenge.

& 21 Vict. c. 19, § 9; *antea*, p. 511.

(*e*) *Strang v. M'Intosh*, 12 May 1821, F. C.

(*c*) 2 Bell, 210.

the acceptor, though challengeable by the creditor. The mere dependence of a reduction, however probable its grounds, will not form a ground for suspending summary diligence raised against a person who is bound for a bill, by a party holding under the indorsement challenged; for such holder is still *in titulo* of the bill, though he will be accountable for its contents, if recovered by him, on the challenge taking effect (a). 'He will not, however, be accountable for more than he recovers; and if he recover only a composition in a sequestration, he will be liable to repay only its amount (b).'

Although the title to challenge seems to be confined to those who were creditors prior to the deed challenged, the whole benefit of the challenge would probably be held to accrue to the creditors at large (c). It has been said (d), that when a bill due to a bankrupt, but compensated by a large debt which the latter owed to the acceptor, is indorsed to a creditor within sixty days of his bankruptcy, the acceptor has an interest to challenge the indorsation, though the creditors at large have none; and therefore, although, in consequence of a sequestration being awarded, the only formal title to challenge was in the trustee, as acting for the creditors, who had resolved not to challenge, it is stated that the acceptor might in this case demand from the trustee an assignment of his right, or insist in the challenge under his name, on finding security for his relief from expenses. This doctrine appears to be well founded. But whoever has the right of challenge cannot succeed, without restoring the favoured creditor to the benefit of any security or other advantage which he has relinquished in consideration of the right challenged, so far as that benefit has accrued to them. For instance (e), where a banker, who held six bills against an individual, gave them up on receiving indorsations to three other bills, it was found, on these indorsations being reduced by the trustee on the debtor's sequestrated estate, that the banker was entitled to restitution of the bills given up. The creditors are only entitled to set aside a deed so far as they are injured by it; and not also to retain

Who take the benefit of reduction.

(a) *Brown v. Campbell*, 11 Feb. 1809, F. C.

(b) *Drummond v. Watson*, 29 Jan. 1850, 12 D. 604.

(c) 2 Bell, 232. See p. 538, n. (b).

(d) *Ibid.* 415, note 3.

(e) *Blair's Trustees v. Miller*, 18 June 1822, 1 S. 501.

the security or benefit which the creditor renounced in consideration of the deed. But they are not likewise bound to procure restitution of any interest which he may have surrendered to a third party for the deed under challenge, that being a transaction with which they have no concern. For instance, if the creditor has, in consequence of the security, renounced an obligation to him for the debt by a third party, the creditors are not bound to restore this obligation, though they should challenge the security. Nor does the liability of the third party revive; for the discharge of his obligation was absolute; and the reduction of the security, in consideration of which the creditor discharged it, is a mere casualty, of which the latter must be held to have taken the risk. Thus (a), where a creditor, who held an acceptance for his claim, signed by his debtor and his debtor's son, gave it up in consequence of getting an heritable security for the debt, which was afterwards set aside under the Act 1696, he was found not entitled to insist for redelivery of the acceptance against the son, who pleaded that he did not know of the transaction in consequence of which it was renounced.

Grantee's right
to be restored.

Further, if the creditor has given up some security to the debtor, in consideration of the security in question, and the debtor has disposed of it,—for instance, if the creditor has given up a lien on goods, which the debtor has thereafter sold, or redelivered a bill, which the debtor has indorsed away, the creditors, though they succeed in the challenge, are not responsible for these funds, as they have reaped no benefit from them (b). They will, however, be liable to restitution of the goods or bills, if they came into their possession, and are still distinguished from the rest of the estate.

Bills in hands
of *bona fide*
onerous
holder.

Another question is, whether the challenge can nullify a bill or note, or the indorsement to it, when transmitted by the party whose own title in it is challengeable under the Act 1696, to an onerous indorsee? The words of the Act are, that all dispositions, assignments, or other deeds falling under the description already mentioned, shall "be void and null." This nullity, indeed, does not take effect *ipso jure*, but only when the challenge is made by certain persons.

(a) *Black v. Cuthbertson*, 15 Dec. 1814, F. C.

(b) 2 Bell, 233. A case of this

kind occurred, and was decided according to the views now stated, in *Ritchie v. Wyllie*, 27 Nov. 1821, 1 S. 169.

But as soon as they make the challenge, the words of the statute seem to indicate that the nullity is absolute. Whether it is consistent with the negotiability of such documents, that a transaction between the granter or first indorser and his payee or indorsee should affect another indorsee who knew nothing of it, and who gave full value to his indorser, or whether personal grounds of objection should be extended beyond the parties from whose conduct they arise, is a question of expediency which deserves the attention of the Legislature. But the words of the Act, if construed literally, seem to create a nullity, which would affect the title not only of the payee, but of subsequent indorsees. Each holder has a claim against all the indorsers whose indorsements are subsequent to the challengeable deed, because each of them is considered as a new drawer. But, according to the construction now stated, he could have no claim under the bill or note against the bankrupt's estate, whether the bankrupt was drawer, acceptor, or indorser of the bill or note; nor, if the bankrupt was drawer or indorser, could he have a claim against the drawee, or any of the parties liable previously to the bankrupt's indorsement, as the bankrupt's subscription, which is his title, either mediately or immediately, would be altogether null. This construction, however, would be very dangerous to the rights of onerous indorsees; and the want of a decision on the point, though it must have often occurred, indicates that the general understanding is inconsistent with it.

SECTION II.

WHEN ARE BILLS OR NOTES VESTED IN THE BANKRUPT AS HIS OWN PROPERTY, AND WHEN AS AGENT FOR ANOTHER PARTY; AND WHAT, IN THE LATTER CASE, IS HIS POWER, OR THAT OF HIS CREDITORS, OVER THEM?

1. *When are Bills or Notes vested in the Bankrupt as his own Property, and when as Agent for another?*

This question depends on two circumstances, viz.,—

- 1st, On the possibility of separating the bills or notes alleged

to have been given in trust from the other property of the person entrusted with them; and, 2dly, On the question, Whether they were deposited with him only for a special purpose, or whether the full property of them was transferred to him?

Possibility of distinguishing between property and deposits.

(1.) When effects are deposited with a third party for a special purpose, they continue the property of the depositor, so long as they can be distinguished from the depositary's other property. This rule is applicable even to money or bank-notes, while in the depositary's possession, and distinguishable from his other property. The delivery of them to any third party will transfer the property, so that it cannot be reclaimed by the owner. But their currency has not come into operation while they remain with the depositary; and therefore the owner's right of property still attaches to them, if they are distinguishable from the holder's other effects (a). Thus, money or bank-notes sent by a carrier, if put up in a separate parcel, would be recoverable by the owner from his bankrupt estate. So, in a case where an Edinburgh bank was employed by a Dundee bank to take up its notes for them from the other Edinburgh banks, which they put up on certain days in sealed parcels to be sent by the first opportunity, entering the amount, at the same time, in their book, and giving notice by post to the Dundee bank, it was found that the latter bank had a claim to the property of notes of theirs which had been thus parcelled, entered, and notified, though they remained in possession of the Edinburgh bank at the time of their bankruptcy (b). In another case (c), where the country agent of an Edinburgh bank was in the habit of keeping the money which he received from the bank to carry on their business, in a strong box to which he and they had separate keys, it was decided,

(a) This principle, as applicable to money, is fully expounded by Lord Ellenborough, C. J., in *Taylor v. Plumer*, 3 M. and S. 571. The case is well worthy of attentive perusal, as elucidating the whole doctrine of the limitations which the principal's right in property, of whatever kind, entrusted to a factor, imposes on the factor's power of control, and on the title vested in his creditors by his bankruptcy.

(b) *Bertram, Gardner, and Co.'s*

Trustee v. The Dundee Bank, 18 Jan. 1797, 1 Bell, 260, note 2.

(c) *Gilchrist v. Christie's Trustee*, 4 July 1809, 1 Bell, 264, note 3. *Vide* also *Tooke v. Hollingsworth*, 5 T. R. 215, where money which had been given *in specie* for a particular purpose, and remained at the bankruptcy of the person entrusted with it, distinct from his other property, was held to be reclaimable from his assignees by the original owner.

on his bankruptcy, that all the money found in this box belonged to them, although he had been engaged, with their knowledge, in other employments besides that of their agent, particularly in certain trusts; and though the creditors maintained that none of the money in the box could be the same *in specie* which he had got from the bank, and that he should not be allowed to appropriate any part of his general funds, by the mere act of placing it in the box, to one of his employers more than another. But whether this money was the same coin which had been sent by the bank or not, the circumstance of its being thus placed by him in the bank coffers pointed it out as money which he had realized in the bank's business; nor could his other employers or creditors complain of its being appropriated to the bank by his act, since they knew that such appropriation of the money which he drew from the bank must take place from the nature of his agency, and must thus be held to have relied on his honesty in making the appropriation. The same doctrine is applicable to bills and notes, when entrusted to a person only for a specific purpose, and distinguishable from the rest of his effects.

In another case, viz. where money, bills, or other effects entrusted by one person to another are converted into a new form, *e.g.* by being exchanged for money or goods, certain distinctions must be observed, in considering whether the substituted funds become the property of the owner of the original funds. *First*, if the substituted effects are distinguishable from the holder's other property, and are clearly traced as the proceeds of the original bills or effects, and if the factor has not diverted them from the destination of these effects, the one will remain the constituent's property as much as the other. For instance, in an English case (*a*), where a factor sold certain goods which were consigned to him, and took notes for the price, it was decided by the Court of Common Pleas

Effects substituted for deposited bills

(*a*) *Scott v. Surman*, Willes, 400, referred to as an anonymous case by Lord Chancellor Hardwicke in *Dumas ex parte*, 1 Atk. 234. In this case, Willes, C. J., who delivered the judgment of the Court, places the distinction between money and notes, with reference to the matter in question,

entirely upon this, that money entrusted to a person, even for a special purpose, could not, in general, be distinguished from his other funds. The converse of this doctrine is, that, if it could be distinguished, the property even of it would still remain with the original owner.

that these notes, being distinguishable from the holder's other property, and coming in place of the goods, belonged to the consigner of the goods. The same doctrine was followed in Scotland in an early case (*a*), where a factor, employed to sell certain goods for another, having taken a bond for the price in his own name, it was decided, on his death, that the price was not *in bonis* of him, but that the owner of the goods was entitled to recover it, as coming in place of the goods, directly from the purchaser. In this case, however, *first*, the question was not with the factor's creditors, but with his next of kin and with the purchaser; and, *secondly*, there was written evidence of the factor having taken the bond for his constituent's behoof, though apparently in his own name.

In another case (*b*), an executor having appointed a factor by his own authority, and taken from him a bill for the realized proceeds of the executry, payable to himself or order, which he deposited with a third party, on a receipt bearing that it was to be applied in payment of the claims against him as executor, his constituent's nearest of kin were found entitled, in preference to his creditors, to the proceeds of the bill, as forming part of the executry. Certain cash which he likewise deposited with this third party did not appear to be considered in the same light, as it was merely given to the depositary to meet any claims which might be made against him as executor. But the bill being clearly traced to arise from the executry, and he having appropriated it to executry purposes, the next of kin were preferred to it even against creditors. In another case (*c*), where an executor's factor, after realizing the proceeds of the executry, lodged them in a bank on receipts in his own name, but the money thus lodged was designated as part of the executry, by a note holograph of him, found in his repositories at his death, the executor was found entitled to the money, in preference to a claim of compensation by the bankers on a debt due to them by the factor. In this case it may be doubted whether the bankers were not entitled to rely on the fund as belonging to the

(*a*) *Street v. Home*, 9 June 1669, M. 15122.

(*b*) *Baird v. Murray's Creditors*, 4 Jan. 1744, M. 7737 and 15130.

(*c*) *Alison v. Fairholms*, Nov. 1761, M. 15132.

factor, and retain it for their claim against him, unless they knew that it belonged to the executry (a). But this remark does not apply as to the factor's other creditors or representatives, with reference to whom the doctrine of *surrogatum* is strictly applicable.

(2.) The same result follows, though bills or money remitted to an agent for a special purpose should be confounded for a time with his other funds, if the agent ultimately sets them apart for their original purpose, his act in thus setting them apart again to his constituent's use rendering them as completely his as if they had always continued distinct from other funds. This doctrine was fully brought out in the following English case (b). A paymaster of the forces having remitted bills to a London house, with previous orders to purchase a certain kind of foreign coin with the proceeds, and send it out to him, the London house raised money on the bills by discounting them, and then sent the proceeds to a house in Lisbon, with directions to procure the coin there ; but if they could not do so, to send back good bills for the amount. The Lisbon house, as they could not procure the coin, sent back bills ; and the London house having in the meantime become bankrupt, the remitter of the original bills was found entitled, by the Lord Chancellor, to these new bills, in a competition with the assignees of the London house. The leading principle of the decision is comprised in these words of his Lordship, that, if the sum first remitted "got into the general fund, it got out again," and that "it acquired an identity and a distinction from all the rest of the fund by the application of it, by sending it to Portugal." It was assumed, that if the coin had been purchased, the original remitter might have seized it, "as purchased by his order with money remitted by him for that purpose ;" and it was held that these bills were as much distinguished from the general fund, and marked out for his property, as the coin would have been if it had been purchased. It was therefore held that the remitter might himself have stopped the transaction at Lisbon, and taken the bills, or laid hold of them as his after they reached London. It was doubted whether money thus sent out for the purchase could have been claimed, though, perhaps, it might

Deposits undistinguishable for a time afterwards separated.

(a) *Vide* Mr Bell's remarks on this case, ii. 131, note 5.

(b) *Ex parte Sayers*, 5 Vesey jun. 169.

also have been considered as separated from the other funds. But it was held that the bills were completely set apart as the remitter's property, and therefore belonged to him.

Unauthorized
conversion of
deposited bills.

(3.) It does not make any difference, although a factor, after receiving money or notes for a special purpose, should convert them into a new form for a distinct purpose of his own. The substituted effects will be considered notwithstanding as the constituent's property, as they form merely a *surrogatum* for the original money or bills. This doctrine was expounded in an English case (*a*), where a gentleman having sold out of the funds by advice of his stockbroker, and given the latter a draft on his bankers for the proceeds, that he might vest them in Exchequer bills; but the broker having vested a great part of them in American stock, and in bullion, to carry them off to America, this question occurred, whether the property of these effects vested in the broker, so as to go to his assignees under a commission of bankruptcy, or remained with his constituent? The Court of King's Bench, after a full argument on a special verdict, decided in favour of the constituent. The ground of decision appears to have been, that if the original effects still remained the constituent's property, his right of property was not vacated by their transmutation into a new form, but followed them in that state, whether the change had been made in pursuance of the constituent's instructions, or in contravention of them (*b*). One result of this doctrine is, that if a factor employed money or bills entrusted to him for a certain purpose, in buying bills or notes in his own name, and these remained in his possession unnegotiated at his bankruptcy, while there was still an unbroken connection between them and the constituent's effects with which they had been acquired, the latter would be entitled to reclaim them as his property.

Authorized
conversion.

(4.) But when the constituent entrusts the factor with money to buy goods or procure bills for him, which the factor purchases in his own name, then, unless the money has been set apart from

(*a*) *Taylor v. Plumer*, 3 M. and S. 562.

(*b*) Lord Ellenborough, C. J., who delivered the judgment of the Court, gives a full exposition of the whole law, and of all the authorities on the subject; and distinctly lays it down,

even with reference to money, that the property of it does not pass from the original owner, unless when it is so confounded with the mass of the factor's other property, that it can no longer be traced or identified.

the factor's other property, the constituent's right in it resolves into a mere personal claim for repayment. It cannot revive, till the factor again sets it apart for the constituent's use, as, in a case already cited (*a*), where money was remitted to Portugal for the purpose pointed out by the constituent. But, in the case now supposed, it is laid down (*b*), that the effects so purchased remain his property, subject to a personal obligation to convey them to his constituent. In one case (*c*), where a party who had got money from another to purchase goods for him, bought them in his own name, though he appeared to have designed them for his constituent's behoof, the Court decided that the right to them was still in the factor, and that consequently they were attachable for a debt due by him. The same doctrine would apply to bills or notes, though they remained with him unnegotiated at his bankruptcy. It has been suggested, however (*d*), that if a factor, after thus purchasing goods, intimates to his principal that they are bought for his behoof, and that they are lying subject to his disposal, the property will be vested in him. The same doctrine would probably apply to bills or notes thus purchased, if they remained with the factor, though taken in his name; because, agreeably to a case already referred to (*e*), they are marked out as the constituent's property, by being set apart for the purpose which he had appointed. The constituent, indeed, could not have reclaimed them from onerous holders, because the factor retained the power of conveying them away, by taking them in his own name. But there was such an appropriation as entitled him to reclaim them from the factor himself, or from his general creditors.

Independently, however, of these cases, which depend on the possibility of distinguishing effects or bills deposited from the factor's property, there is another question, viz.,—

2dly, Whether the principal has merely deposited them with the factor for a special purpose, subject to his right of property, or has transferred the property, trusting to the factor personally for the proper exercise of the powers conferred on him?

When property held to be transferred to factor.

(*a*) *Ex parte Sayers*, p. 545, note (*b*).

(*b*) *Stair*, i. 12, 16; *Erskine*, iii. 3, 34; 1 *Bell*, 268, note 1.

(*c*) *Boylstoun v. Robertson*, 24 Jan. 1672, M. 15125.

(*d*) 1 *Bell*, 268.

(*e*) *Ex parte Sayers*, p. 545, note (*b*).

That the principal may retain the property, he must indicate clearly that the bills, etc., are merely deposited for a special purpose. If a person commissions goods from another who is not his factor, and sends him bills for the price as soon as he gets the invoice, he will not be entitled to recover the bills, though the other party should fail with the goods in his hands, since he has parted with the property of the bills, and trusted to the seller's credit for the fulfilment of his part of the contract (*a*). But if a person remits bills to another, that he may purchase goods for him with the proceeds, but is himself obliged to pay the price, from his factor's failure to do so, he may reclaim the bills, as being still his property, seeing they were remitted only for a special purpose, and are distinguishable from the factor's other property (*b*). The principles already laid down lead to this conclusion, which is also illustrated by various cases, to be immediately noticed, where bills are remitted by the principal solely to cover acceptances by the factor for his behoof, but which the principal is obliged to retire (*c*), or where they are deposited without indorsation, in security merely of past advances (*d*). But this leads us to consider the doctrine now stated, in the case in which it is most frequently applied, viz. that of bills or notes remitted to bankers.

In this case, several distinctions must be observed.

Bills discounted by bankers.

(1.) When the banker discounts bills or notes, he is in some sense the purchaser of them, and they become thenceforward his property (*e*). It will make no difference, although the banker, after discounting a bill, should, instead of paying its amount to his customer, place it, after deduction of discount, to the credit of his account. For, from the moment of discount, the banker takes all risks of the bill being stolen or destroyed, and the discounter has an absolute right to draw for its amount, under deduction of the discount (*f*). But,

(*a*) 1 Bell, 261.

(*b*) *Ibid*.

(*c*) *Vide*, on this subject, *Tooke v. Hollingsworth*, 5 T. R. 215.

(*d*) *Britten ex parte*, 3 D. and Ch. 35.

(*e*) *Per* Lord Ellenborough in *Giles v. Perkins*, 9 East. 14 ; *vide* also *Carstairs v. Bates*, note (*f*).

(*f*) The circumstances and the decision, as well as the ground of judgment, were as stated in the text, in *Carstairs v. Bates*, 3 Camp. 301, *per* Lord Ellenborough. His Lordship referred to the doctrine which he had laid down in the preceding case of *Giles v. Perkins*, that a banker discounting a bill was the purchaser of it.

(2.) The property of bills or notes is not transferred, when they are merely remitted to a banker, or any other person, for a special purpose, *e.g.* to recover payment of them, or to answer other bills when due (*a*). In that case, the banker's right, in a question between him and the remitter, is limited by the condition on which the bills were remitted. If they are indorsed to the banker specially, or are transferable by mere delivery, from being blank indorsed, or made payable to the bearer, the banker may have thus a title to them absolute in form, such as would make them transferable to a third party. But while he retains them, his right, as it depends on the whole transaction by virtue of which they were transferred to him, must be limited by the condition of transference; and his creditors succeeding him by diligence, or in consequence of his bankruptcy, to the right as it stood in his person, must take it under this condition. Thus (*b*), where a bill had been remitted for the purpose of applying the proceeds in payment of another bill, the remitter, who had been obliged to take up the last bill, was found entitled to get back the proceeds of the other bill from the assignees of the party to whom it was sent.

Bills sent
with special
instructions.

The same doctrine has been established regarding bills sent to meet the remitter's acceptances, or bills accepted by the banker for his accommodation. Thus (*c*), where certain bills and notes were remitted specially to meet bills accepted by another party for the remitter's behoof, these bills and notes, on the death of the person to whom they were sent, were found not to form part of his general funds, but to be applicable to the payment of those particular bills. Again (*d*), where a banker had accepted bills drawn on him by a customer, under an agreement by the latter to make remittances for answering them when due, and the customer was himself obliged to retire them from the acceptor's bankruptcy, it was decided that the proceeds of the bills remitted by him to answer the acceptances belonged to him, under deduction of the cash balance due by him in account with the banker. The latter was held to have merely a

(*a*) In *Buchanan v. Findley*, K. B. 1829, 9 B. V. C. 738, it was held that where a debtor sent bills to his creditor to be discounted and applied to a particular purpose, the creditor could not, on the debtor's bankruptcy, set off the proceeds against a debt due to

himself. Compare *antea*, pp. 176 and 189, and *postea*, p. 571 *et seq.*

(*b*) *Ex parte Peyron*, 2 Rose's B. C. 366.

(*c*) *Hassall v. Smithers*, 12 Ves. 119.

(*d*) *Zinck v. Walker*, 2 Sir W. Blackstone, 1154.

lien on these bills, first for the balance due to him, and secondly, to indemnify him against the acceptances. In another case (*a*), where two parties agreed that the one should purchase for the other all the light guineas which he could get, and that he should be entitled to hold these, as well as any other value remitted to him, to meet bills drawn on him by the other party; but these bills, though accepted, were not paid by him, in consequence of his bankruptcy, so that the drawer was obliged to pay them; it was decided, first by the Court of King's Bench, and afterwards by the Exchequer Chamber, on a writ of error, that the latter was entitled to get up the gold, which remained distinguishable from the other effects, as well as certain bills which he had remitted to answer the acceptances from the other party's assignees.

Where (*b*) a bill had been sent by a person to his bankers, for the special purpose of meeting his acceptances payable at their house, he was found entitled, on paying those acceptances, to have back this bill from their assignees. It was held in this case, that, if the purpose of sending bills is expressed, no entry by bankers in their books can extend their right beyond it. On the same principle, in a case (*c*) where bankers, with whom a bill was deposited by the payees in security of advances made to them, had sent it back to the payees to recover payment, and it was found unpaid among their effects on their bankruptcy, it was held that the bankers had not, by sending the bill for this special purpose, renounced their lien over it, but were entitled to have it back from the assignees. Indeed, it is assumed, in all the cases to be afterwards noticed, that an appropriation of bills to a certain purpose always limits the depositary's right in them.

Bills sent to
banker with-
out special
instructions.

(3.) When bills or notes are sent to a banker without special instructions, it will be presumed, from his occupation as a banker, that he gets them merely as a factor to recover payment, and the property of them will remain with his principal. Thus (*d*), where

(*a*) *Tooke v. Hollingsworth*, 5 T. R. 215. In *ex parte Sollers*, 18 Vesey, 229, where a bill had been sent to a banker indorsed to recover payment, and his assignees received payment after his bankruptcy, they were ordered to refund the money to the remitter.

(*b*) *Ex parte Aitken*, 2 Mad. 192.

(*c*) *Bruce v. Hurley*, 1 Stark. 24.

(*d*) *Giles v. Perkins*, 9 East. 12, per Lord Ellenborough, who delivered the judgment of the Court of King's Bench.

a party who had an account with a banker, sent him certain bills, without precise instructions respecting them, and the banker failed, while he owed this customer a balance independently of the bills, the latter was found entitled to get back the bills from the banker's assignees, as it was held that he had placed them in the banker's hands merely to recover payment. The same decision was given under similar circumstances in another case (*a*), where it was held that the circumstance of bills being entered generally in the banker's books, and not written short (which means entering them in an inner column, and not carrying them out, or including them in the account between the parties till they are paid), did not transfer the property from the customer, unless his concurrence in this mode of entering them was proved, or might be inferred from the course of dealing betwixt the parties. In another case (*b*), it was held that the banker must be presumed to have got the bills only as a factor, unless he proves the contrary: and, afterwards (*c*), it was decided, on the authority of this case, that such bills, though credited to the customer in the cash account, and interest allowed on them when paid, while, till then, the customer was debited with interest on them, were not the banker's property, and that, on his bankruptcy, the customer, when the balance of accounts was in his favour, might claim indemnity for them, from correspondents to whom the banker had transferred them on his own account, to the extent of the surplus remaining in their hands, from certain securities deposited with them, after their lien over these securities, for the balance due to them, was satisfied. It will not obviate such a presumption that the banker has entered the bills in his books as cash, unless the customer has been allowed a credit for them, and has drawn on it. He cannot otherwise be bound by entries to which he is no party (*d*). But,

(*a*) *Ex parte Sargeant*, 1 Rose, 153.

(*b*) *Thomson v. Giles*, 2 B. and Cr. 422.

(*c*) *Armistead ex parte*, 2 Gl. and Jam. 371.

(*d*) No regard was paid to such entries in *Giles v. Perkins*, p. 550, note (*d*), or in *ex parte Aitken*, p. 550, note (*b*). In *ex parte Sargeant*, 1 Rose, 153, where a party having an account with a banker

on which there was a balance in his favour at the time of the latter's bankruptcy, demanded certain bills not due at the bankruptcy, which had been remitted by him to the bankers without any special instructions, and had been entered in their books as cash, Lord Chancellor Eldon held that this last circumstance could not affect his claim to them, unless the entry

Evidence from
banker's books.

(4.) When bills sent to a banker are entered short in his books, such an entry forms the best evidence that the banker has got them merely as an agent to recover payment, subject to a lien for his indemnity against his own acceptance (a).

Case of cur-
rent account.

(5.) The case where the remitter has a current account with the banker admits of several distinctions. A remittance of bills, not for any specified purpose, but to the general account, will render the bills the banker's property (b). But if one bill is sent expressly to retire another, this a specific appropriation, which will prevent the banker from acquiring the property of it (c). In another case (d), where two parties were in the habit of drawing and re-drawing on each other, and kept separate accounts, and one of them

had been made with his concurrence, or unless the course of dealing between the parties indicated that they were regarded as cash, as where the remitter drew, or became entitled to draw, on the credit of them. Such an entry of bills remitted was also disregarded, when made without the customer's privity, in *Thomson v. Giles*, p. 551, note (b). In this case, too, the mere circumstance of a customer being entitled to draw on the credit of deposited bills, was not held sufficient to show that they were transferred to the holder, it being proved by other circumstances that they were not discounted.

(a) *Vide* the Lord Chancellor's opinion in *ex parte Sargeant*, p. 551, note (a); in *ex parte Rowton*, 17 Ves. 431; in *ex parte Waring*, 19 Ves. 345; and in *Perfect ex parte*, 1 Mont. B. C. 25. *Vide* also *ex parte The Burton Bank*, 2 Rose, 162-3, and *ex parte Harford*, *id.* 163, where all such bills entered short were ordered to be given up, on the remitter indemnifying the bankers against their acceptances for the remitter's behoof. The authority of *ex parte Waring* on this subject was also recognised by the Vice-Chancellor in *ex parte Parr*, Bucks, B. C. 191, though the case, which depended on a number of specialties, was not finally

decided. It was held in that case, that after bankers had recovered enough of cash on part of the short bills deposited with them, to meet their own acceptances, their assignees could not retain the residue of the short bills against the depositor.

(b) This was held, under similar circumstances to those now stated, in *Bent v. Puller*, 5 T. R. 494, where a party having a current account with a banking-house, consisting on one side of drafts accepted by them for him, and on the other of remittances sent by him to meet those drafts, on which there was a balance against him; and having remitted bills generally to this account, it was held by the Court of King's Bench, that, as there was no specific appropriation of these bills, they must be considered as transferred to the banker on the general account, and could not be reclaimed by the remitter, though he had been obliged, in consequence of the banker's failure, to retire the bills accepted for him by them. *Vide*, to the same effect, *ex parte Flournois*, cited in *ex parte Oursell*, Ambler, 297.

(c) This doctrine is laid down by Lord Kenyon, and Buller, J., in *Bent v. Puller*, note (b).

(d) *Ex parte Dumas*, 1 Atk. 232, 2 Ves. 582.

drew bills on the other, which he desired to be entered in a particular account, and promised to make remittances to answer, and thereafter remitted bills nearly for the amount of the acceptances, which the receivers promised to enter to the same account, and did so, it was decided that there was a specific appropriation of these bills, and that, on the receiver's bankruptcy, the remitters were entitled to have back such of them as remained unnegotiated in the hands of his assignees. These bills were assimilated to goods consigned, but remaining unsold at the time of bankruptcy. In a case (a), arising out of the same bankruptcy, where a party who had been in the practice of drawing and redrawing with another party, and had drawn bills on this party, which were accepted, remitted two bills, not on account of the sum due by him to them, since he was their creditor in the general account, but to answer what remained for them to pay on his account, this was held to be an appropriation of the bills to their acceptances for his behoof; and therefore, as these were not paid, from the bankruptcy of the acceptors, he was found entitled to recover back the bills from their assignees. In a case (b), where certain bills, sent indorsed to bankers by a customer, were credited to him for their full amount, without deducting discount, and he was allowed to draw for their amount, provided he either indorsed them, or gave the bankers a guarantee for payment; but he was also charged, in the banker's account, with interest on all cash payments to him from the time of making them, and on payments in bills from the time when the bills were paid, and credited in the same way with payments made by him in cash or bills; it was held that the bills above mentioned were not discounted or bought by the banker, and that therefore the depositor, on the cash balance, independently of them, being in his favour, might reclaim them from the banker's assignees. The charging of interest against him on bills and cash paid for him, and the allowing him interest on cash and on the bills remitted by him, excluded the idea of the banker's having discounted the bills remitted by him. The same doctrine was laid down in another case, to be afterwards noticed (c). It was not held to make any difference on this claim, that the

(a) *Ex parte Oursell*, Ambl. 297.(c) *Ex parte Pease*, 19 Ves. 25 et(b) *Thomson v. Giles*, 2 B. and Cr. seq.

banker had been in the habit of circulating such bills without the customer's knowledge. It seems to follow *a fortiori*, that such bills cannot be held as discounted, or otherwise transferred to the banker, when the customer is only allowed to draw for part of their amount.

Bills at long,
exchanged for
bills at short,
dates.

(6.) When a person deposits with a banker bills at long dates, and receives from him bills at shorter dates on the security of them, the long-dated bills are the remitter's property, and he may reclaim them from the banker's assignees, if he restores the short bills, or makes payment of them. Thus (a), a party having deposited long-dated bills with bankers, on condition of being allowed to draw for a certain sum (after deducting commission, etc.), at two or three months without renewal, which he did, and the bankers having accepted his drafts, but failing before their acceptances became due, so that they came back upon him, he was found entitled, on giving them up to the banker's assignees, to have back the bills deposited by him, as they had not been discounted, but merely impledged in security of the drafts. On the other hand (b), where a person had an account with a bank in Liverpool, on the credit side of which were entered all cash paid or bills deposited by him with them, and on the debit side all cash paid to him, or bills paid on his account, some of which bills were made payable at a house in London, consisting of two partners of the Liverpool house, and he proposed to the Liverpool house that they should procure his bills to be paid by the London house as they fell due, and gave the former house bills blank indorsed to provide for such payment, some of which bills they negotiated, and sent others to the London house (entering them to his credit in their own books, while the London house entered them to their credit in its books), it was decided by the Court of Common Pleas, on the bankruptcy of both houses, that there was no specific appropriation of these bills to the payment of the depositor's bills, but that he had transferred his right in them to the Liverpool house on his general account, trusting to them to apply them, at their discretion, in meeting his bills, which they had done, by sending them to the London house on their own general

(a) *Parke v. Eliason*, 1 East. 544.
The general doctrine stated in the text was also laid down by the Lord

Chancellor in *ex parte Twogood*, 19 Ves. 232.

(b) *Bolton v. Puller and Others*, 1 Bos. and Pull. 539.

account. He was therefore found not entitled to get back any of these bills from the assignees of the London house, though that house had not provided for payment of the first bills, so that he was obliged to pay them himself. No appropriation of the bills was here either expressed or implied: they were paid in to the Liverpool house, not as factors to recover payment, but with full powers to convert them into cash, or otherwise use them to provide for the other bills. There are other cases where the question has been, Whether bills remitted by a person to his bankers, to enable them to retire other bills, may be reclaimed by him on providing for these bills? But that question has always turned on this point, Whether there was a special appropriation of the bills to this purpose, or whether the remitter has merely transferred them on his general account, leaving it to his bankers to dispose of them according to their discretion (a)? Several distinctions, applicable to different circumstances in which this question has occurred, are stated in the notes.

2. Power of the Bankrupt or his Creditors over Bills vested in him as Agent.

We shall now consider, *2dly*, What power a banker or factor has over bills or notes entrusted to him either as factor or banker?

If a bill or note, though remitted to a banker or factor for a limited purpose, is indorsed to him absolutely, or is blank indorsed, or made payable to a third party, so as to be transferable by delivery, any party receiving it from him will have a full right to it, though it is transferred in violation of the agreement between him and his constituent. This results from his unlimited title *ex facie* of the

Power to
indorse.

(a) In *ex parte Pease*, 19 Ves. 25-61, where the question related to the claims of several country banks to have back bills from the assignees of a London bank (Boldero and Co.), with which they had been deposited, the whole law on this subject was fully and anxiously discussed.

In *ex parte Buchanan*, 19 Ves. 201, short bills (*i.e.* bills entered short), which had been remitted by the holders to their bankers in London, were

ordered, on the bankruptcy of the bankers, to be delivered up by their assignees to the remitters, on the latter allowing a sufficient sum to be retained for answering the bills which the bankers had accepted on their account.

In *ex parte Clayton*, cited 2 Christian's B. L. 167, the same order was made for restitution of certain short bills remitted to bankers, on the remitter paying all the bills which these bankers had accepted on his account.

document (a). Nor is it every restriction of his right, even *ex facie* of the bill or note, which will render an indorsement or transference by him ineffectual (b). But when a bill or note is made payable to him *only*, or to him for the indorser's use, this will prevent him from indorsing it for his own behoof, though not from discounting it, as he may be held to have discounted it on account of his constituent (c); or, when it is ordered that the amount of the bill or note should be credited to *the indorser's account* (d), his power of transference will be restrained, whether he is payee or indorsee.

Right of lien.

But, besides, a banker or other factor holding bills or notes, has a lien over them for the balance due to him by his constituent. This lien covers all advances and engagements made or contracted by him under the character in which he receives the bills or notes. For instance, if they are remitted to him in the general character of factor, he may retain them, and, when they are indorsed, may enforce payment of them, to the extent of all advances made by him under that character; or, if they are remitted to him as banker, whether to be discounted or for any other purpose, they may be thus used in security of advances made or engagements contracted by him for his customer, as banker (e). But bills or notes deposited with him merely as a banker, cannot be retained, or payment of them recovered, for advances made by him generally as factor; nor, when deposited with him as factor, can they be retained for advances made by him in any other character (f). Further, his lien does not extend to bills or notes appropriated by the customer (when he remitted them) to a special purpose; as the banker, by taking them under this condition, has ex-

(a) *Collins v. Martin*, 1 Bos. and Pull. 651; and *per Eyre*, C. J., in *Bolton v. Puller*, *id.* 539. *Vide* Chapter on Indorsation, *antea*, p. 173.

(b) *Antea*, p. 184.

(c) *Antea*, pp. 176, 184.

(d) *Antea*, p. 185.

(e) *Per* Lord Ellenborough, in *Giles v. Perkins*, 9 East. 14; *per* Abbott, C. J., in *Bolland v. Bygrave*, 1 R. and M. 271. But, indeed, the same doctrine is implied in all the cases already cited, where bills or notes were deposited with a banker on the remitter's

general account, since the claim for restitution of them, in all these cases, proceeds on the assumption that the customer has relieved the banker from advances made or engagements entered into on his account. In *Scott and Others v. Franklin*, 15 East. 428, a banker was found entitled to exact payment from the drawer of a bill indorsed to and deposited with him, to the extent of his balance, though the remitter had offered *generally* to pay the balance, *if any was due*.

(f) *Vide* 2 Bell, 120.

cluded any general claim of lien (*a*). If they are deposited in security of a certain specified sum, they cannot be retained as securities, beyond this sum, for his general balance (*b*). He himself, too, renounces his lien over a bill or note when he discounts it, whether this is done by giving money for it, or by appropriating it to the payment of advances already made by him (*c*). But other bills or notes not so discounted, may be still retained for his general balance, though that should be composed in part of the amount of the discounted bills (*d*). It may be doubted (*e*) whether bankers are entitled in their account to charge interest in the form of discount on the particular bills discounted, whether the general balance of the account is in their favour or not; and thus, even supposing these bills have been paid, to deduct the discount from their amount as credited, and retain the undiscounted bills to make up the difference. This would be to apply the undiscounted bills indirectly in payment of the discount; whereas they are only applicable to the general balance, of which this discount forms no part, because it relates exclusively to the bills discounted.

If a bill is discounted, the discounter, though he may rank for the full amount on the estate of each of the obligants, can only do so to the effect of recovering the amount of that bill; so that, if he has recovered 19s. *per* pound on it from the other obligants, he

(*a*) *Vide* 2 Bell, 119. The same doctrine is implied in Lord Kenyon's opinion in *Davis v. Bowsher*, 5 T. R. 491, and was also held by the Court of Common Pleas in *Key v. Flint*, 8 Taunt. 21, where the question was, Whether a bill deposited with a banker for the specific purpose of raising money on it, could not be reclaimed by the depositor's assignees, on their repaying the banker the money which he had advanced on it, or whether he could retain it for his general balance? The Court decided in favour of the assignees. The special nature of the deposit was held to exclude any plea of mutual credit. This judgment was afterwards affirmed on an application by the banker for relief to the Court of Chancery. *Ex parte Flint*, 1 Swanst.

30. In a Scotch case, *Matheson v. Anderson*, 12 June 1822, 1 S. 486, it was found that certain bills which had been indorsed to a banker, for the special purpose of getting them accepted, could not be retained by him, in security even of a debt due to him by the indorser.

(*b*) *Vere ex parte*, 4 D. and Ch. 295.

(*c*) This was admitted with regard to bills appropriated to certain special advances, in *Davis v. Bowsher*, note (*a*).

(*d*) This was decided in *Davis v. Bowsher*, note (*a*). *Vide* also the opinion of Abbott, C. J., to the same effect, at *Nisi Prius*, in *Hall and Another v. Barnard*, 1 R. and M. 382.

(*e*) *Vide* Lord Kenyon's opinion in *Davis v. Bowsher*, *supra*.

cannot rank on his customer's estate to the effect of recovering more than the remaining 1s. *per* pound due upon it. On the other hand, if the banker or factor holds the bill as a security for his general balance, he may, notwithstanding his possession of it, rank on his customer's estate for the whole balance, since the bill is given, not as a substitute for his claim, but in further security of it; and, if part of the balance is still unpaid, he may then rank for the full amount of the bill on the estates of the other obligants, to the effect of making up the deficiency (*a*). In England, he is allowed to prove on such bills, to the effect of indemnifying him for other bills accepted by him for his customer, though not yet due; but he cannot draw a dividend till these his acceptances are paid (*b*).

Lien over
bills deposited
for special
purpose.

A banker's lien does not extend to bills left with him solely for discount, but which he has refused to discount; for they have been placed in his hands for a purpose exclusive of the lien (*c*). But his lien extends to all bills and notes deposited with him, whether indorsed or not (*d*). When they are placed in his hands blank indorsed, or are indorsed to him specially without restriction of his title, he may effectually impledge them with a third party for his own debt (*e*). For his customer has entrusted him with the full power of transferring them either in pledge or otherwise, so as to give a complete right to the transferee. But when a bill or note is so indorsed as to exclude his power of transference, or is deposited with him unindorsed, he cannot convey even his own right of lien over it; since his right, *ex facie* of the document, is limited to the security resulting from the possession of it.

(*a*) 2 Bell, 118.

(*b*) *Per* the Lord Chancellor in *ex parte Bloxham*, 8 Ves. 532, referring to *ex parte Maydwell*, Cooke's B. L. 179.

(*c*) 2 Bell, 120.

(*d*) *Per* Lord Ellenborough, in *Giles v. Perkins*, 9 East. 14. In *Jourdaine v. Lefevre*, 1 Esp. 66, Lord Kenyon found a banker entitled to retain a note which had been deposited with him, and entered short in his customer's account, in security of a general bal-

ance arising from bills which he had discounted for the customer, and which had turned out bad. It was held to make no difference that the discounted bills were in a separate account from the cash account, in which the note in question had been entered.

(*e*) *Vide* *Collins v. Martin*, and other cases, *antea*, p. 556. *Vide* also *Inglis v. Bruce and Others, Creditors of Smith, M'George, and Co.*, 17 June 1817, 2 Bell, 119, note 1.

SECTION III.

EFFECT OF BANKRUPTCY OR INSOLVENCY ON THE CLAIMS ARISING
AGAINST THE BANKRUPT ESTATE FROM BILLS OR NOTES.

The subject of this section may be considered,—

1. Where the bankrupt estate has no counter claims against the holder of the bill or note; and,

2. Where there are such counter claims.

The last head will lead us to discuss the doctrine of compensation and retention as applicable to bills and notes, either when the holder of the bill or note pleads it in extinction of another debt, or when its currency is stopped by the holder's bankruptcy, so as to render it liable to a plea of compensation or retention by any of the obligants in it. Having thus examined it in its simple form, we shall then consider its application to the case of bills or notes held by two bankrupt estates against each other, and particularly how far, and under what limitations, it is applicable to bills or notes granted by two different parties for each other's accommodation, in the event of both parties becoming bankrupt.

1. *Claim when Bankrupt Estate makes no counter Claim.*

The subject included under this head shall be considered,—

(1.) As to the claim of the holder or creditor in a bill or note.

'It is the holder of the bill or note who can alone claim or be ranked in a sequestration (a); but it is not always necessary that his title should be *ex facie* complete at the moment of claiming. Thus, a person who had paid a bill to a messenger-at-arms who was doing diligence on it, was allowed to vote in the election of trustee, though his title had not been legally completed by assignation (b). And in a similar question, a party who held a bill as executor was allowed to vote, though the bill was specially indorsed to a bank, and there was no reindorsement (c); and a party who held bills with indorse-

Who may be ranked.

(a) *Campbell v. Myles*, 27 May 1853, 15 D. 685. Compare *Brown v. M'Callum*, 7 Mar. 1845, 17 S. Jur. 296.

(b) *Nicoll v. Romanes*, 20 Dec. 1855, 18 D. 283.

(c) *Aitken v. Woodside*, 26 Feb. 1852, 14 D. 572.

ments on them to third parties was allowed to vote, though these indorsements were not scored (*a*). The holder of a prescribed (*b*), vitiated (*c*), or unstamped bill (*d*) cannot vote; but the holder may bring other evidence to support his claim (*e*), and before the claim is finally rejected, the trustee ought to give him an opportunity of doing so (*f*). On the other hand, it does not follow that the holder of an apparently good bill is in all circumstances to be ranked, even to the minor effect of allowing him to vote. If there are grave circumstances of suspicion attaching to his title, his vote may be rejected. Thus the vote of a near relative was rejected, where the bill was long overdue; no explanation was given of its origin; and no steps taken to recover it till within three days of the bankruptcy (*g*). And the holder is also prevented from voting in elections, on bills acquired after the date of sequestration, otherwise than by marriage or succession (*h*).'

Amount for
which holder
ranks.

The holder's title to any bill or note, *ex facie* forms a presumption of onerosity and *bona fides* in his favour, which in Scotland (*i*), under the exceptions already mentioned, cannot be disproved unless by his writ or oath. The extent of his claim on it, in these circumstances, is nearly the same as against solvent parties, in which view it has been already discussed (*k*).

It will not form a ground of abatement from the holder's claim, that he has only paid the amount of the bill or note to the former holder, under deduction of discount, since discount is his legal compensation for advancing money on it (*l*). He may also prove for the full amount of a bill or note due to his author, although he should have paid only 10s. *per* pound for it, as he may acquire a bill-debt, like any other debt, by purchase, on what terms he pleases (*m*). It may even be held that a bill or note, indorsed as a

(*a*) *Hain v. M'Cubbin*, 13 Dec. 1853, 16 D. 179.

(*b*) *Romanes v. Nicoll*, 17 June 1856, 18 D. 1042; *Lockhart v. Mitchell*, 12 July 1849, 11 D. 1341.

(*c*) *M'Cubbin v. Turnbull*, 28 June 1850, 12 D. 1123.

(*d*) *Pilling v. Drake*, 30 June 1857, 19 D. 938.

(*e*) *Kerr v. M'Ewan*, 8 Feb. 1845, 7 D. 400.

(*f*) *Pilling v. Drake*, *ut supra*.

(*g*) *Anderson v. Guild*, 12 June 1852, 14 D. 866.

(*h*) 19 & 20 Vict. c. 79, § 64; *Larrie v. Harvey*, 7 June 1848, 10 D. 1236.

(*i*) *Antea*, p. 54 *et seq.*

(*k*) *Antea*, p. 430 *et seq.*

(*l*) *Ex parte Marlar*, 1 Atk. 150.

(*m*) *Ex parte Lee*, 1 P. Williams 782; *ex parte Upham*, 17 Ves. 212.

donation, affords a claim for its amount against the obligants (a). If the holder's author has got the bill or note from a third party for his accommodation, the holder, if he has paid full value, may claim its full amount, either against the granter if solvent, or against his estate if he is bankrupt, although he knew when he took it that it was an accommodation bill or note. Even if he has advanced on the faith of it a sum less than its amount, or has taken it in security of such a sum, or has received part payment of this sum after it was given him, yet it has been held in England, and would probably be held in Scotland, that he may rank for the full amount, to the effect of drawing complete payment of the debt for which he took it. It is in this case a separate security on which he relied, and he cannot have the full benefit of it, unless by ranking to this extent. It is thus applied, as it was intended, for the accommodation of the party giving it (b). But the holder cannot prove on such a security against his own debtor, beyond the amount of his debt (c). When such bills are delivered by the drawer to a creditor, as collateral securities for a debt larger than their amount, and both drawer and acceptor become bankrupt, but the acceptor's estate proves solvent, it has been decided that the creditor is both entitled to draw 20s. *per* pound on the bills from the acceptor's estate, and also to prove his original debt against the drawer's estate, and draw dividends on the ranking, in liquidation of the balance of it (d). But when bills taken as collateral securities for a debt due by the acceptor were paid in full by other obligants, after the creditor had

(a) *Antea*, p. 20.

(b) *Ex parte King*, 1 Cooke, 177; *ex parte Crossley*, *ibid.* and 3 Br. Ch. Cas. 237. In this last case, the holder of the bill had received part payment of his debt after the bill was given to him. *Ex parte Blozham*, 6 Ves. 449, *per* Lord Eldon, Chancellor. In *ex parte Blozham*, 5 Ves. 448, Lord Loughborough, Chancellor, had ruled that the holder, in such a case, was not entitled to rank for more than the amount of his debt. But the contrary was afterwards ruled by Lord Eldon in the case now mentioned, and Lord

Loughborough's order was accordingly reversed; 6 Ves. 600.

(c) *Per* Lord Chancellor in *ex parte Blozham*, 6 Ves. 450. This doctrine is also implied in *ex parte De Tastet* 1 Rose's B. C. 11.

(d) *Sammon ex parte*, 1 D. and Ch. 564. *Contra*, *Rufford ex parte*, 1 Gl. and Jam. 41. *Vide* also *Read and Others ex parte*, 3 D. and Ch. 48, where the holders of bills indorsed to them in security of a debt were allowed to rank for them on the estates both of drawer and acceptor, to the effect of recovering the full debt and interest.

ranked for his whole debt on the acceptor's estate, *excepting the bills as securities*, it has been decided (a), that the amount of the bills thus paid must be deducted from the amount of proof for which he was entitled to draw dividends from the acceptor's estate. It has been also decided (b), that where a creditor took a bill, signed by a third party, for his debtor's accommodation, on a direct understanding with that party that he held it only for the debt ultimately due to him, he cannot prove against the granter of the bill for its full amount, but only for the balance of the original debt remaining, after deducting the dividend drawn from the primary debtor's estate. It has been decided (c), that a person receiving goods from his debtor, with permission to sell them for payment of his advances, but thereafter selling them to a broker for his own debtor, and taking bills for the price directly from the debtor, is not entitled to prove on these bills against his debtor's bankrupt estate for more than the amount of his advances. It was held that such a transaction could not be considered as properly a sale, but merely as a return of the goods, whereby the lien over them was renounced, and nothing remained but a personal claim for the advances. If the creditor has received, on account of his debt, a bill or note which he has failed to negotiate (d), this must be deducted from the sum for which he ranks, because his claim against the debtor is held *pro tanto* to be extinguished. If a creditor has received, in part payment of his debt, a draft or indorsation which is reducible by other creditors, this cannot be deducted from the sum for which he is to be ranked, if he is willing that it should go into the common fund (e).

Claim on bill
not yet due.

The creditor in a bill or note may claim on it against the debtor's sequestrated estate, although it is not yet due; 'but if the debt is not payable till after the date of the sequestration, he is entitled to vote and rank for it only after deduction of interest from that date (f).' It appears to be settled, that a creditor for a future debt

(a) *Brunskill ex parte*, 4 D. and Ch. 442. *Vide Reader ex parte*, Buck. 381.

(b) *Reader ex parte*, 1 Buck. B. C. 381.

(c) *Ex parte Thompson*, 18 Ves. 231.

(d) This doctrine is implied in *Bic-*

kerdike v. Bolman, 1 T. R. 405, although notice of dishonour was held to be unnecessary in that case, because the drawer had no effects in the drawee's hands. See *antea*, p. 94.

(e) 2 Bell, 322-3, and *Mann v. Shepherd*, 6 T. R. 79.

(f) 19 & 20 Vict. c. 79, § 52.

may join in a petition for the debtor's sequestration, the statutory amount of his debt being fixed by making the deduction now specified. The statute authorizes creditors generally to join in this petition; and the only exception is that of creditors whose claim is contingent. But there is no exclusion of creditors in future debts (a).

When a trustee under a sequestration has ranked a creditor on a bill, and prepared and advertised the scheme of division, containing a dividend on it, in terms of the statute, he is not entitled afterwards to state any objection against the grounds of debt (b). If a cautioner for payment of a bill is ranked for its full amount on the drawer's estate, as having paid it, though on an affidavit which admits that he got the greater part of the amount from an indorser of the bill, he, not the indorser, is held to be *in titulo* of the dividend, and it cannot be arrested in the trustee's hands by a creditor of the indorser (c).

After ranking claim, trustee cannot object to it.

The holder of a bill or note is entitled, on non-payment by the acceptor or granter, to claim its full amount from each of the other obligants (d). He may therefore either exact the full sum from one of them, or obtain partial payments from them severally, in what proportions he chooses, till the whole is paid. While they are solvent, this can create no difficulty. Nor is there much difficulty, though they are all insolvent, if he has ranked on all the estates before any of them yields a dividend: for, as he will be entitled to rank on each for the whole amount of the bill or note, to the effect of drawing full payment, the obligation of each party is as available for the whole debt as if each had granted a separate obligation; and nothing can prevent him from enforcing it against each, but the plea that he would thereby obtain more than full payment. Under this exception, his right to enforce the full obligation remains entire, notwithstanding any partial payment which he may have got from the estates of other obligants, whether by

Holder's claim against the several obligants.

(a) *Vide* 2 Bell, 320; 19 & 20 Vict. c. 79, § 14.

(b) *Gillespie v. Barbour*, 27 May 1835, 13 S. D. B. 835.

(c) *Barbour v. Williamson & Others*, 10 Nov. 1835, 14 S. D. B. 27.

(d) In like manner, a party who has

accepted for accommodation, and been obliged to retire the bill, may rank on the estates of the drawer and indorser whom he accommodated, for the full amount, to the effect of drawing full payment. *Ashley v. Muir*, 25 Feb. 1845, 7 D. 525.

ranking or otherwise (a). But in England it has been decided, that when a dividend has been paid, or even declared on the estate of one obligant, before the holder of the bill or note has proved against the estates of the other obligants, he cannot rank on them for more than the balance remaining after deduction of this dividend (b).

In Scotland, there have been several decisions connected with this subject. One of these occurred (c) in a case where the acceptors of a bill had made partial payments to account of it before it fell due, but after the payee and indorser, being insolvent, had executed a trust-conveyance of his whole effects for behoof of his creditors. In these circumstances, the bill having been protested when it fell due, and diligence raised on it, after which the protest and diligence were assigned to another party on his taking it up, this party was found not entitled to recover, under his assignation, from the estate of the payee and indorser, more than the balance remaining after deduction of the partial payments by the acceptors. It seems to have been held, that the payee's trust-conveyance for

(a) 2 Bell, 337-8; *ex parte Wildman*, 2 Vesey sen. 113, *per* Lord Chancellor Hardwicke, referred to in 12 Ves. jun. 438; also *per* Lord Chancellor Eldon in *ex parte Russell*, 10 Ves. 416; Cooke, B. L. 173; Cullen, 96. The same rule, which is stated in a number of other cases as completely settled, is repeated by the Lord Chancellor in *ex parte The Bank of Scotland*, 19 Ves. 310, although that case was held, for a reason to be immediately mentioned, not to fall under the rule.

(b) This was ruled in *ex parte Ryswick*, 2 P. Williams, 89, where the holder of a bill, having received a dividend from one party's estate, was found not entitled to rank on the estate of another party for more than the balance. In *Cooper v. Pepys*, 1 Atk. 106, parties who had merely *accepted* a composition from the estate of one obligant in certain promissory-notes, before proving on the estate of another, were found not entitled to rank for more than the balance. In

ex parte Leers, 6 Ves. 645, and *ex parte Todd*, 2 Rose's B. C. 202, note, it was decided that, where dividends on the estate of one obligant had been even declared before proving against the estate of another obligant, the creditor could only rank for the balance; because the dividend, as soon as declared, was his money in the hands of the assignees, which he might have therefore received before his proof. In *ex parte The Bank of Scotland*, 19 Ves. 310, where a dividend had been not only declared, but received by the creditor's agent, though without his knowledge, the Lord Chancellor decided, after much consideration and with great reluctance, that the creditor proving afterwards against the estate of another obligant could only be ranked for the balance. The rule appears thus to be the same, whether the dividend has been received, or has only been declared.

(c) *Dunlop v Speirs*, 5 Feb. 1779. M. 14107.

behoof of his creditors, though made before any of the partial payments, did not therefore give the holder a claim for the full amount of the bill, seeing it was reduced by the payments before it became due. A similar rule was adopted (*a*) regarding the sum to be ranked under a composition-contract, it being held that the creditor in a bill, having got another bill indorsed to him in payment of the original bill, which last bill was paid before he subscribed the contract, the amount of the last bill, on its being paid, must be deducted from the sum for which he was entitled to rank under the composition-contract. But a different rule was adopted, in a case (*b*) where the payee and indorser of a bill had made partial payments to account of it before it became due, but after the acceptor's estate had been *sequestered*. In that case, the holder of the bill was, notwithstanding, found entitled to rank on the acceptor's sequestered estate for its full amount, it being held that sequestration operated as an assignment of the debtor's effects to all his creditors for payment of their debts, whether then due or not; "and that, therefore, the date of sequestration must be taken as the point of time at which to estimate the amount of the debt to be ranked." The same doctrine has been recognised in two subsequent cases (*c*). These judgments appear to have proceeded on the terms of the statute, as to the special case of sequestrations. But the other cases cited authorize a different rule as to the effect of partial payments on a bill or note, when made either before or after it becomes due, in limiting the balance to be ranked on the estate of any of the obligants under a private trust.

The adoption of the English rule, even in this case, may often lead to capricious results; for example, by making the amount of the dividend obtained from one estate depend on the accident of the creditor not ranking on it first, but ranking first on another estate, on which a dividend has been declared. Besides, a dividend drawn

(*a*) *Barr v. Livingston*, 4 June 1824, 3 S. 100.

(*b*) *Robertson v. Bank of Scotland*, 3 July 1823, 2 S. 450.

(*c*) *Mein v. Sanders*, 6 Mar. 1824, 2 S. 778; and *Farquharson v. Mason and Co.'s Trustee*, 15 May 1832, 10 S. 526. In *Hamilton v. Cuthbertson*, 6 Feb. 1841, 3 D. 494, a similar deci-

sion was given. The holder received partial payments from the drawer indorsers, who were insolvent, after the bill became due, and before the acceptor's sequestration. In claiming in this sequestration, it was held that the holder was obliged to deduct the previous payments.

from one estate, for the full sum ranked, though it may satisfy the security on it, does not satisfy the separate security held against another estate (*a*). But it may be doubted whether this dividend should not be considered at least as a partial payment to account of *the debt*; and if the debt has been thus diminished by receipt of a dividend from one estate, before it is ranked on the other, it does not appear, in the case of a private trust, how it can still be ranked for the full sum, as if there had been no such payment. The security which is still held against the separate estate would rather seem to depend on the actual amount of the debt, so as to be lessened as the debt is diminished; as an heritable security, when a partial payment of the debt has been made from the debtor's other funds, ceases to be available for more than the unpaid balance (*b*). If this principle is correct, the accidental hardship which the application of it may sometimes produce, affords no reason for deviating from it.

Claims on
separate bills.

When a person proves in England for the full amount of several bills which he has discounted, and thereafter receives payment of some of them in full, it has been decided (*c*), that he must deduct from his proof the amount of the bills thus paid; and it has been also decided (*d*), that when a party proves for the full amount of a debt, in security of which he has got several bills or notes, and thereafter receives full payment of them, he must restrict his proof to the total balance remaining due after deducting such payment. These seem to have been considered, not as cases of ranking on different securities, but of partial payments to account of the debt, made by the extinction, in the first case, of some of the bills that constituted a part of it; and, in the second case, of a bill given in security of it. A different doctrine, however, has been held in Scotland. In one case (*e*), certain bills which had been indorsed to bankers by a customer, in security of their advances for him, having been fully paid after their customer's sequestration, they were, not-

(*a*) 2 Bell, 291, 4th edit.

(*b*) 2 Bell, 289-90.

(*c*) *Ex parte Smith*, in *re Lewis and Potter*, Cooke, 175; *Barret ex parte*, 1 Gl. and Jam. 327.

(*d*) *Ex parte Bloxham*, *ex parte Wallace*, Cooke, 176; *ex parte Burn*, 2

Rose's B. C. 55. *Vide also Brunsell ex parte*, 4 D. and Ch. 442; and *Vere ex parte*, 4 D. and Ch. 123, 2 Mont. and Ayr. 295.

(*e*) *Fall and Co.'s Trustee v. Sir William Forbes and Co.*, 27 May 1790, M. 14135.

withstanding, found entitled to rank on his estate for the whole of their advances, to the effect of recovering full payment. This decision may, perhaps, have proceeded on a clause of the Bankrupt Act 1783 (under which the sequestration was awarded), but which is not contained in the present Act, whereby partial payments received from other obligants after the debtor's sequestration are not allowed to be deducted from the amount of the creditor's ranking. But in a later case (*a*), where the accommodation acceptor of certain bills, who had got them up on payment, had recovered the price of a ship which was mortgaged to him in security of these bills, he was found entitled still to rank for the full amount of the bills against the real debtor, on the ground that the holder of two securities may claim on each *in solidum*, to the effect of recovering complete payment. This principle may probably be held to extend even to the case of payments received from third parties on bills indorsed in security of a debt, as in the first case now cited, because, if such bills are considered as separate securities, no payment made on them can, according to the foregoing doctrine, interfere with the creditor's right to rank against his debtor for the full debt (*b*). This doctrine seems applicable even to ranking under private trusts; and, accordingly, in one case (*c*), it appears to have been assumed, that a bill indorsed by a debtor to his creditor on account of his debt, before the creditor subscribed a composition-contract, was not to be deducted from the sum to be ranked for the composition (even though it was ultimately paid), if it had been indorsed merely as a security for the debt. But the Court was satisfied that it had been intended from the first as a payment, and therefore the creditor was allowed only to draw a composition on the balance, after deducting it. The sum to be ranked under a sequestration is held, according to two decisions already noticed, to be regulated in all cases by the amount of the debt at the date of sequestration.

When two bills have been drawn by a company on one acceptor, but indorsed to two different parties, it has been decided, that,

Claims on bills granted by a company.

(*a*) *M'Dougal v. M'Dougal*, 5 June 1801, Morr. App. to Right in Security, No. 1.

(*b*) It was so held in *Black v. Melrose*, 29 Feb. 1840, 2 D. 706.

(*c*) *Barr v. Livingstone*, 4 June 1824, 3 S. 100.

although the drawee is liable only for one, both are entitled to rank on the estate of the company which issued them (*a*). In Scotland, on the bankruptcy of the company, or of the individual partners, the creditor of the company in a bill or note ranks for it, first, on the company's estate, and then only for the balance against the estates of the individual partners (*b*). The creditor of an individual partner can only claim against that balance of the company funds which remains due to his debtor after the company debts are paid. Since this balance is a portion of the partner's individual estate, the claim of his creditors against it is only part of the ranking on his estate; and therefore, though they have previously drawn a dividend from his individual estate, they may still rank for their full debt on his share of the company funds, to the effect of drawing another dividend. In England, the doctrine now explained as to the ranking of company and individual creditors, is the rule at common law (*c*). But the rule established there in equity is, that the company creditors can only claim, first, against the company estate, and the individual creditors of partners against their separate estates, there being no claim by the former against the separate estate of partners, or by the latter against the company estate, except in so far as there is a surplus on each after paying its own class of creditors (*d*). It has been decided, however, that when a bill drawn by a company is subscribed by partners of the firm separately, for instance, under a distinct firm, the holder, if he was ignorant of the partnership, may sue each of the parties according to his liability on the bill (*e*). It does not even appear that his knowledge of the partnership should prevent him from claiming against each of the parties, according to the obligations undertaken by each of them on the face of the bill. If different partners of a firm are engaged in separate trades under other firms, and any of these firms is subscribed to a bill or note, though it should be taken for a joint debt, the creditor will be entitled to rank on the estate of the separate firm, under its subscription, as well as against the common partnership, which is his proper debtor (*f*). So, if one of

(*a*) *Farquharson v. Mason and Co.'s Trustee*, 15 May 1832, 10 S. 525.

(*b*) 2 Bell, 661.

(*c*) Chitty, 485.

(*d*) *Ib.*

(*e*) *Ex parte Adam*, 2 Rose, B. C. 36; *ex parte Parr*, 18 Ves. 65.

(*f*) *Per the Lord Chancellor in ex parte Bonbonus*, 8 Ves. 546.

several partners draws a bill on two other partners, who are joined in a distinct concern, and they accept it, though for a joint debt due for a common adventure, the holder may rank on the estates both of the drawer and acceptors (a).

We shall now consider,—

(2.) The claims of the different obligants in a bill or note against each other, from having made payment to the creditor.

Claims of the
obligants
inter se.

It has been shown that, *ex facie* of a bill or note, the drawer of the bill or indorser of the note has a claim of relief for payments made by him against the acceptor or granter (and the indorser against the drawer as well as acceptor); and further, that a posterior indorser has a claim *in solidum*, both against these parties and against prior indorsers. If a party pays the whole debt, but only in that case, he is entitled to rank for its amount on the estate of each of the prior parties, to the effect of making good his full claim of relief. If the holder cannot get full payment, even by ranking on the estate of each obligant for the whole debt, none of these obligants can rank with him on the estate of a prior obligant, for relief from the dividend paid by his estate; because such ranking would diminish *pro tanto* the dividend accruing to the holder from that estate, and to this extent draw back from him the dividend thus ranked. But each obligant is, with reference to the holder, a principal debtor for the full debt, and cannot therefore thus draw back from him any part of the dividend which he has paid, or lessen his creditor's ranking against other estates, which are equally bound to him for the full amount. When the surety is liable to the holder of a bill or note as an indorser, he must pay its full amount, if required; and will then have all the holder's rights against the prior obligants, by becoming holder. But it is the same thing whether he thus draws back his relief from the prior obligants, after paying the full sum, or whether the holder ranks on their estates first, and comes against him for the surplus; since his loss will amount, in both cases, to that proportion of the bill or note which the estates of the prior obligants could not satisfy (b). But as the holder can only rank on the several estates to the effect of drawing full payment, the right of any obligant to rank for relief takes effect as soon

(a) *Ex parte Wensley*, 2 V. and B. 254.

(b) *Chitty*, 482 *et seq.*; 1 Bell, 347-8, and cases therein cited.

as the holder is paid ; and therefore if there is any surplus of the dividends accruing to his ranking on any of the estates, after his claims are satisfied, or any dividends effecting to the debt from estates on which he has not ranked, posterior obligants will be entitled to draw these dividends in relief, the last obligant being always preferred over prior obligants, who are bound to him, as all the obligants are to the principal creditor. Nor have the other creditors on the estate that yields these surplus dividends an interest to resist this measure, since their debtor's estate is bound for the whole debt, and it is *jus tertii* to them whether its full amount be ranked by the proper creditor, or by another person, to draw back a portion of the debt paid by him, and for which the estate is liable to him. The holder is bound, after being paid, to assign his right to any obligant, in order to facilitate his claim of relief ; but the claim is effectual, independently of an assignation. If the estate of any obligant affords the full debt, each posterior obligant will be relieved from it, either by the creditor drawing full payment from that estate, or by their coming into his right against it, for relief of the sum paid by them. But no debt can be ranked twice on the same estate. This doctrine is settled both in Scotland and England (a).

If a party has subscribed a bill or note solely for the benefit of another, although *ex facie* of the bill or note he appears to be debtor, he will be entitled to come in place of the principal creditor, for relief, against the estate of the party accommodated, and of any parties bound to him. But as to subsequent parties who gave value on the faith of his signature, though they should know his real character, he will still be principal debtor, since they relied on his character *ex facie* of the bill or note (b). 'Where one of two parties who are jointly bound for a debt has been obliged to pay it, he can rank on the estate of the other only for half the amount (c).'

Claim against
indorsers of
current bill
while acceptor
solvent.

In Scotland, if the drawer or indorser of a bill or note is bankrupt, while the acceptor or granter is solvent, the holder may rank

(a) 2 Bell, 527. The same doctrine is laid down as a fundamental rule by the Lord Chancellor in *ex parte Walker*, 4 Ves. 385. Indeed, it is implied in every case which refers to

the subject. Vide also Bayley, 436; Chitty, 485.

(b) *Aniea*, p. 235 *et seq.*

(c) *Maxwell's Crs. v. Heron's Tr.* 11 June 1794, 3 Pat. App. 350.

on the estates of the drawer or indorsers, to the effect of having a dividend set apart to him, if he should not recover payment from the acceptor or granter. An indorser may also rank on the estate of the acceptor or any previous party, if the holder has not ranked, to the effect of having dividends set apart for his relief, if he should be obliged to make full payment to the holder (a). 'If the creditor should prefer it, he may apply to the Sheriff or trustee to put a value on his contingent claim, as at the date of the valuation, and then vote and draw dividends on that value as if it were the amount of an ordinary debt (b). If the creditor should afterwards get full payment from the acceptor, he must return the dividend, and cannot retain it on the pretext of applying it to the extinction of other debts (c). When the holder alleges that the acceptor accepted for the bankrupt's accommodation, it is unnecessary to put a value on the security of the acceptor (d).'

2. *Claims on Bills as affected by Counter Claims.*

The effect of counter claims as to bills and notes, whether the holder founds on such documents as grounds of set-off against other claims, or whether any of the obligants set off other claims against them by compensation or retention, in the only case where they are liable to such exceptions, viz. when their currency is stopped by the holder's sequestration.

Compensation is a privilege by which a debtor may set off Compensation. against his debt a counter claim which he has against his creditor. It has been sanctioned in Scotland by an early statute (e), which enacts that liquid debts, or debts capable of being instantly verified by writ or oath, may be set off against each other by exception, but not in a suspension or reduction, after decree for one of them has been pronounced. It has been held (f), that this Act does not exclude compensation at common law. Indeed, it is confined to the case where compensation is pleaded against a liquid claim, in

(a) 19 & 20 Vict. c. 79, § 129; *Fraser v. M'Iver*, 15 June 1860, 22 D. 1190.

(b) 19 & 20 Vict. c. 79, § 53; *Gordon v. M'Cubbin*, 14 June 1851, 13 D. 1154.

(c) *Patten v. Royal Bank*, 26 Mar. 1853, 15 D. 617.

(d) *Dyce v. Paterson*, 11 Mar. 1847, 9 D. 993.

(e) 1592, c. 143.

(f) 2 Bell, 127.

which case this defence is allowed by the Act only on such counter claims as are either liquid or susceptible of immediate liquidation (a). If both the opposing claims are illiquid, they must be ascertained by separate actions; and, in that case, the two actions ought to be conjoined, so as to form the grounds of mutual accounting. This result, though not authorized by the statute, is founded on the same principle with compensation, and may be considered as an example of that defence at common law. But, at present, we have only to consider compensation *de liquido in liquidum*, since it is alone applicable, whether pleaded upon or against a bill or note. Such a document is, of course, a good ground of compensation. On the other hand, no claim can be pleaded against it that is not exigible at the same time with it, and either liquidated in money, or capable of being so immediately.

Retention.

The strictness of compensation, however, is modified, so as to suit the course of business, by the additional remedy of retention, whereby a person lawfully in possession of a property or right belonging to another (b), or who is his debtor, even in a liquid debt, is entitled, under certain circumstances, to retain it for securing his payment even of a future or uncertain debt. This remedy, excepting in several cases of lien, which, so far as they apply to bills and notes, have been already considered (c), cannot be employed to

(a) *Vide* cases on this subject in Morr. 2564-8.

(b) In *Dougal v. Gordon*, 17 Nov. 1795, M. 851, a person who had got an assignation to a debt absolute *ex facie*, but really in security of certain bills due to him by the cedent, was found entitled, after these bills had been taken up by others, still to retain the assignation in security of the new bills, in respect that, by having possession of the debt under an assignation *ex facie* absolute, he was entitled to retain it in security of any debt due to him. This doctrine was held, even on the supposition that the old bills, in security of which the assignation was originally granted, had been altogether extinguished by novation. In *Balleny v. Raeburn*, 7 June 1808,

Morr. App. to Compensation, Part i. p. 6, a party who had got a vendition to a ship *ex facie* absolute, but really for his relief from certain bills accepted by him for the granter of the vendition, was found entitled, in a question with the granter's creditors, even after these bills were retired, to retain the vendition in security of other debts due to him, by virtue of the right of possession which he had from the absolute nature of the vendition. In *Hewit v. Elliot*, 6 Dec. 1775, 2 Pat. App. 381, a party who (legitimately, but not as agent) got bills for a special purpose, for which it was afterwards found that they were not required, was held entitled to retain them, on the remitter's bankruptcy, in payment of a debt.

(c) *Antea*, p. 547 *et seq.*

secure future or unliquidated debts, unless in the event of the debtor's actual or certain insolvency (*a*). In that case, and still more in the case of bankruptcy and sequestration, a liquid debt may be retained in security of any claim, though illiquid, and though differing from it, in the time, place, and kind of prestation into which it is resolvable; nor is the debtor bound to make payment till his claim is liquidated, and either paid or deducted from the other claim (*b*). All claims, therefore, may be set off against bills or notes on the holder's bankruptcy, if not by compensation, at least by retention.

Neither compensation nor retention can attach to a deposit, since its very nature excludes counter claims. This is the rule, not only when money or goods deposited remain distinguished as a species, but where money, even without continuing thus distinguished, is entrusted to a person for a special purpose,—for instance, to a banker to pay a bill falling due at his bank, in which case he cannot set it off against a debt due to himself, either under his lien as banker, or by the general right of retention or compensation (*c*). Nor can compensation or retention be pleaded on a factor's private debt, against engagements concluded with him as factor. Such engagements cannot be compensated unless by the debts of his principal; and debts due to the factor individually cannot be compensated by, or retained in security of, debts contracted by him as factor (*d*). If, indeed, he has a commission *del credere*, he may set off any claim due to him as factor against a claim by the debtor on him individually; because, in that case, *he* is liable directly to his constituent, and has a claim at his own instance against the debtor, which may, therefore, be set off against his private debt (*e*). But

Compensation
not applicable
to deposits.

(*a*) Ersk. iii. 4, 20; 2 Bell, 128.

(*b*) 2 Bell, 127 *et seq.*

(*c*) *Antea*, p. 549; 2 Bell, 129. The doctrine was adopted in *Stewart v. Bisset*, 15 Feb. 1779, Morr. App. to Compensation, No. 2, where a merchant, who had got money from the debtor in a bill to pay it for his behoof, was found accountable for the money to the creditor in the bill upon the debtor's bankruptcy, without regard to his having set off the money against a

debt due by the remitter to himself. But giving a delivery order as collateral security for payment of bills, is not the same as pledging the goods; and it will authorize retention for other debts after the bills are paid; *Hamilton v. Western Bank*, 13 Dec. 1856, 19 D. 152.

(*d*) 2 Bell, 132.

(*e*) *Ibid.*; *Grove v. Dubois*, 1 T. R. 115, by which decision, in another case of *Bize v. Dickason*, 1 T. R. 285,

the principal has also an independent claim against the debtor in addition to the factor's guarantee ; and hence the debtor cannot, on the factor's failure, compensate his claim, if made by the principal, by the factor's private debt (*a*) ; while the principal, to make good his own claim against the debtor, may set it off against a claim due by himself to that debtor (*b*). If, however, the factor deals in his own name, any person transacting with him may set off the factor's private debts against the latter's engagements to him (*c*) ; while, on the other hand, the factor's engagements in such a case, being contracted merely in his own name, cannot be set off against separate claims by the principal, seeing the latter is no direct party to the transaction, but has merely a personal claim against the factor on account of it. This personal claim is different from the real right already considered (*d*), which a principal has in effects, or even money that is merely entrusted to his factor, so long as it can be distinguished from the rest of the factor's property.

It has been decided, that a claim by the trustee for the creditors of the holder of a bill, for the fund in the drawer's hands, by virtue of a protest for non-acceptance, cannot be compensated by a counter claim made against him by the trustee for the drawer's creditors, for the amount of a bill subsequently granted to him by the

the point was held to be completely settled.

(*a*) 2 Bell, 132. The principal's right in such a case to claim directly against the purchaser of goods sold on his account, for the price, was recognised in *ex parte Murray*, Cooke's B. L. 384.

(*b*) *Ferrier v. The British Linen Company*, 20 Nov. 1807, M. Appx. v. Bank, No. 1.

(*c*) *Baxter v. Bell and Maxwell*, 17 Dec. 1800, Morr. Part i. App. v. Compensation, p. 5. In this case the defenders, being debtors for the price of goods sold to them by a merchant in his own name (though really for behoof of a person who had consigned them to him,—a fact which the buyers did not know), were found entitled, on his bankruptcy, to set off the price against a bill due to them by him individually.

A similar decision was given regarding a counter claim pleaded under the like circumstances in *Hitchiner, Hunter, and Co. v. Stewart and Ninian*, 8 Dec. 1803, Morr. 14204. These decisions must be held to overrule the earlier cases of *Alison v. Fairholms*, Nov. 1765, M. 15132, and *Belches v. Johnston*, 31 Jan. 1770, Morr. Part i. of App. to Compensation, 1, in so far as they are of a contrary tendency. For an account of the first of these cases, *vide* p. 544. The doctrine now stated was adopted in England by the Court of King's Bench in *George v. Clagget*, 7 T. R. 359, in conformity with a previous case, *Rabone v. Williams*, cited in 7 T. R. 360, note, in which Lord Mansfield had laid down the law to the foregoing effect.

(*d*) *Antea*, p. 541 *et seq.*

holder for the price of part of the drawer's property purchased by him (a).

It has been laid down, that, during the subsistence of a partnership, no one partner can set off a debt due to himself individually against a company debt, seeing the company is the proper debtor, and that, on this principle, no debt due by an individual partner can be set off against a claim by a subsisting company. There cannot, it is said, be a *concursum debiti et crediti* in either case, because the creditor is not the same person with the debtor (b). But the most recent authorities in Scotland appear to authorize this conclusion, that, as a partner may be sued directly, even during the subsistence of the company, for the whole of any company debt, he is entitled, even then, to compensate such debt by his own private claims, because his right of compensation should be always commensurate with his liability (c). But it does not follow that a claim by the company can be compensated by the debt of a single partner; because, although he is liable for all the company debts, the company is not liable for his private debts, and hence there is not in this case a *concursum debiti et crediti*. When the company is dissolved, each partner, being then liable for the whole of the company debts, is entitled to compensate them, if payment of them is demanded from him, by any debts due to himself *privato nomine* (d). It has been

Compensation
in company
bills.

(a) *Falconer v. Campbell*, 22 Jan. 1824, 2 S. and D. 630.

(b) 2 Bell, 664.

(c) This doctrine is contrary to that held in *Mackie v. M'Dowal*, 29 Nov. 1774, M. 2575. But it was laid down in the more recent cases of *Bogle v. Ballantyne*, 8 July 1793, M. 2581, and *Scott v. Hall*, 13 June 1809, F. C., in both of which, although the defence of compensation was pleaded by the partner of a dissolved company, it was held to be equally competent to any one partner, though the company had subsisted and been solvent. The authority of these cases was confirmed in *Russell v. M'Nab*, 26 May 1824, 3 S. 53, and *Salmon v. Padon*, 17 Dec. 1824, 3 S. 406. In the latter case, where an action was brought against a subsisting company for the share of

stock due to a retired partner, it was held that they might set off against it a payment made by one of their partners for this individual, on account of the debts of another concern, for which he and they were jointly liable.

(d) This doctrine was established in *Bogle's Trustees v. Ballantyne*, 8 July 1793, M. 2581, where it was decided, after the fullest discussion, that the partner of a dissolved company, being sued by the creditor of a deceased partner for his share of input stock, which was a company debt, was entitled to set off against it a bill due to him by this deceased partner individually, although another partner, who was solvent, was a joint defender along with him; it being held that, as he was sued for the whole debt, he had a right to compensate it to its full amount. The

said, that this right of compensation depends on the circumstance of the company creditor asking decree against the partner for his whole debt, since it is only by being thus made liable for the whole of it that he can become entitled to compensate it to the full amount by his private debt. If the company creditor, therefore, claims the full debt only from their bankrupt estate, such a claim, it is said, cannot be met by compensation on the private debt of a partner; nor can any partner set off his private debt, except in so far as the company debt is made his, by suing him for it individually (a). But the doctrine adopted in the cases already cited, even with relation to a subsisting company, appears to be, that a partner's liability for the company debts entitles him to set off his private debt against it to the full amount. Further, it has been decided, that the creditor of a company is not only entitled to recover his claim from an individual partner, but may, after the company is dissolved and bankrupt, make it good by pleading compensation or retention of a debt due by him to that partner individually (b). This right, indeed, according to the doctrine laid down in the cases now cited, appears to be applicable even while the company subsists; because, if a company creditor is entitled to recover his claim against an individual partner, he must be equally entitled to retain what he owes to that partner, in extinction of it.

Compensation
among co-
obligants;

On the authority of the latest decisions now referred to, it has been held, that any one of several co-obligants in a bond to a bank (though they are merely cautioners with reference to another of the

same doctrine was recognised and applied in *Scott v. Hall*, 13 June 1809, F. C.; and in a later case, *Russell v. M'Nab*, note (c), where the First Division of the Court proceeded on a review of all the preceding cases. In this case, a claim by the partner of a dissolved and bankrupt banking company for his private debt, was found to be compensated by a counter claim of his debtor on certain notes issued by the company, which it was found that he had a right to recover from any individual partner, and consequently to set off against a debt due by him to that partner. The doctrine laid down in the text has been also adopted in England,

in *Lane's Assignees v. Slidstone*, 5 T. R. 493, and *French v. Andrade*, 6 T. R. 582.

(a) *Vide* a discussion on this subject by Mr Bell, ii. 664-5; also to the same purpose, the late Lord Meadowbank's notes on the case of *Bogle v. Ballantyne*, as quoted 2 Bell, 668. But *vide* Mr Bell's note, ii. 665-6, with regard to the interpretation put on the decision, *Bogle v. Ballantyne*, in the more recent cases. It must be now assumed, that in the Court of Session the law is settled as laid down in the text.

(b) *Russell v. M'Nab*, 575, notes (c) and (d). *Hotchkiss v. Royal Bank*, 28 Nov. 1797, 3 Pat. App. 618.

obligants), may, as each is liable for the full debt, compensate it to the full amount by a debt due by the bank to him individually (*a*). This was the doctrine laid down by the Court, though merely in passing a bill of suspension. The case was held to be still stronger, as being argued on the assumption that the obligants had got a charge on the bond, because this was considered as a judicial demand for the full debt, which entitled them to defend themselves by pleading compensation to the same extent.

When the same company has two firms, a debt claimed from one of the firms may be compensated by a debt which the creditor owes to the other firm. The debtor and creditor are here identical (*b*). When two companies are distinct from each other, in their partners or otherwise, but a debt is contracted to a third party under a firm used indiscriminately by both companies, the creditor, if he does not know which company bound itself, may make his claim against either, or set off his claim against a debt due by him to either company (*c*). They have both subjected themselves to this risk by adopting the same firm. But the creditor, by selecting one company, renounces all claim against the other, since only one of them can be bound to him. This doctrine has been adopted in two cases of claims made on bills signed by such an equivocal firm (*d*).
among different companies.

Compensation or retention is easily applied under the foregoing limitations, when the debtor becomes creditor of his creditor during his solvency. But the case is more difficult when he acquires a claim against him after his insolvency. If such a claim is acquired after the creditor is sequestrated, or his estate conveyed to a trustee for his creditors, there cannot be a *concursum debiti et crediti*, as the bankrupt is no longer creditor in the debt due to him, but is divested of it (*e*); and although his trustee or creditors must take it, subject
Claims acquired after insolvency.

(*a*) *Dobson v. Christie*, 28 Feb. 1835, 13 S. 582. A similar ground of decision was adopted by Lord Jeffrey, in an analogous case, *Allan v. Christie*, Nov. 1835, where the interlocutor was acquiesced in.

(*b*) *Williams' Trustee v. Inglis*, 13 June 1809, F. C.

(*c*) *Sir William Forbes v. Forrester's Crs.*, 27 Feb. 1798, 2 Bell, 670, note 1.

(*d*) *Baker v. Charlton*, 1791, Peake, 80; and *M'Nair v. Fleming*, 16 July 1812. *Vide* a full account of the grounds of judgment adopted by the Lord Chancellor in the latter of these cases, as given in a note by the late Sir Samuel Romilly, 2 Bell, 670, note 1. The case has been reported by Mr Paton, vol. v. p. 632.

(*e*) 2 Bell, 130.

to pleas of compensation or retention which *previously* attached to it, yet, after his claim has become vested in them, there are no longer *termini habiles* for raising a counter claim against it, by acquiring a debt in which he and not they are debtors. But while the bankrupt remains undivested of his estate, and consequently of the claim in question, it does not appear that the debtor can be prevented from setting off against it a counter claim which he acquired, even after his bankruptcy, in the fair course of trade, as there is thus a direct *concursus debiti et crediti*. It will be a good objection, however, to the counter claim, that it has been acquired in the knowledge of the creditor's bankruptcy or insolvency, to create a preference. If the bankrupt has, within sixty days of his bankruptcy, entered into a transaction in favour of his debtor, without which he could not have been enabled to set off the counter claim against his debt to the estate, such a transaction will be reducible under the Act 1696, as amounting to a security. This was the ground of challenge pleaded in a case already stated (a), where, however, the Court sustained the transaction, as one in the ordinary course of business. The acquisition of a claim against the bankrupt from a third party, with the sole view of extinguishing, by means of it, a debt which the acquirer owes to the bankrupt, will also exclude him from setting it off against his debt, because it is not a fair transaction in the course of business, but a fraud on that fair distribution of the bankrupt's funds which must form the rule in every case of bankruptcy. Compensation and retention being merely equitable remedies, intended for the relief of parties who have acquired fairly the means of pleading them, cannot be thus perverted, *in fraudem* of the other creditors. As sequestration is a judicial act, it will be presumed, in questions of this kind, after it is awarded, that every person is certiorated of the debtor's bankruptcy (b).

Claims acquired with a view to compensation.

The doctrine now laid down is applicable in all cases where a debtor acquires a claim against his creditor, after knowing of his bankruptcy, for the sole purpose of founding compensation or retention. For example, it has been decided, that one member of a company taking an indorsation from the company to a bill, after he knew that the granter was insolvent, could not plead compen-

(a) *Hepburn v. Bell*, *antea*, p. 529, note (d).

(b) 2 Bell, 130.

sation on it against a claim of rent previously due by him to the granter (*a*). The principle on which this case is said to have been decided is applicable to this whole class of cases, viz. “that if the debtors of persons insolvent were to be permitted thus to avail themselves of assignments obtained from particular creditors, it would be easy to disappoint the remainder of them of that rateable and just payment of debt to which they are entitled.”

It has been held (*b*), that a prescribed account which was not proved by the alleged debtor’s writ or oath, could not be pleaded in compensation of a bill. The same rule would apply to a plea of compensation founded on a prescribed bill (*c*). But if the debt is instructed by the debtor’s writ or oath (*d*), it seems to afford ground for compensation or retention.

Compensation
on prescribed
bill.

Retention may be pleaded in case of bankruptcy, to secure future and contingent as well as present claims. The law of set-off in England depends now on the statute 6 Geo. IV. c. 17, §§ 47, 50, according to which set-off is allowed, wherever mutual credit has been given before the issuing of a commission of bankruptcy, and which has thus superseded various anomalies that arose under the previous enactments (*e*). In Scotland, where retention is a right at common law, it is sufficient, whether there has been mutual credit before the bankruptcy or not, that a person should, at the time of exercising it, have any claim, however distant or contingent, against the other party. It has been decided, for instance, that even the plea of compensation might be elided by retention in security of such a claim (*f*); so that the debtor in a bond was excluded from pleading compensation on a bill due to him by the charger, by the right of the latter to retain the bill-debt till he was relieved from a cautionary obligation which he had contracted for the other party. It follows, that the drawer or indorser of a bill or note, the former of whom,

Retention to
meet contin-
gent claim.

(*a*) *Cauvin v. Robertson*, 18 June 1783, Morr. 2581.

(*b*) *Clark v. Buchanan*, 6 Aug. 1773, Morr. 2664. The account was prescribed before the bill was granted; and even had it not been prescribed, could not have been pleaded in defence, as both parties were solvent.

(*c*) See *antea*, p. 460.

(*d*) *Antea*, p. 479.

(*e*) A short statement of the leading points decided under these enactments was given in the first edition; but it is now expunged as unnecessary.

(*f*) *Irvine v. Menzies*, 10 July 1711, M. 2686. *Vide* also, to the same effect, *Brough’s Creditors v. Jollie*, 26 Nov. 1793, M. 2585.

with reference to the acceptor or granter, drawer or prior indorser, and the latter with reference to the acceptor, is a cautioner, as well as any obligant on the bill or note, who is truly a cautioner, as to other parties, may retain any right or fund in his possession belonging to such parties, or any debt due by him to them in security of his claim of relief, though the holder of the bill or note has not yet made a claim on him.

The application of this doctrine to such claims, on accommodation-bills and notes, shall be considered in connection with what is now to be explained as to cross-bills.

Cross-bills
when parties
solvent.

It has been shown that, in Scotland, any party to a bill or note, who, though directly bound to the holder, is a surety as to another party, has a right, as surety, to claim on that party's estate, either on paying the bill or note to the holder, or for the surplus dividends accruing to it from that estate, after the holder's claim has been satisfied; and he has also a right of retention, as now explained. Cross-bills or notes are not therefore indispensable in Scotland to secure relief to such a party, either by ranking or retention; nor, indeed, are they necessary in England (since the 49 Geo. III. c. 121, § 8, which is repeated by 6 Geo. IV. c. 16, § 52), to enable him to rank on the estate of the person accommodated, as these enactments authorize any person who has become bound as surety for another, to stand in place of the principal creditor, if he has proved the debt, so far as he has paid it or any part thereof; or, if the creditor has not proved, to prove his own demand in respect of such payment directly against the principal debtor's estate. Cross-bills, however, are useful as affording a direct ground of claim, which cannot be redargued, unless by instructing, in Scotland, by his writ or oath, that no value was given for them. These documents are either granted in exchange for each other, as when two parties accept bills or grant notes reciprocally for each other's accommodation, on the understanding that each party is to retire his own note or acceptance; or when a party, who has signed a bill or note for another person's accommodation, gets from him what is called an indemnity-bill or note, not to accommodate him (although he may circulate it, if granted to him without restriction), but on which he may claim for relief, if he is obliged to pay the other bill or note. Bills or notes granted by third parties to the

party accommodated, and only transferred by him, may be thus employed (a).

A party receiving a cross-bill is not an onerous holder, except in so far as he has given value for it in the bill or note exchanged for it (b). But the presumption of full value cannot, in Scotland, be restricted to the effect now mentioned, except by the holder's oath or writ. His books will, in general, afford the best evidence of the real transaction. It is not indispensable to such a course of dealing, that, for each bill or note, there should be a counter bill or note corresponding with it in amount, date, term of payment, and everything else (c). But their discrepancy, in any of these respects, will be a circumstance to prove that they were not granted in exchange for each other (d); and strong contrary evidence, as entries in the books of the parties, or a written agreement between them to grant such accommodations, or stipulations that each party should pay his own acceptances (e), or letters showing that the bills were granted for each other, will be required to show, either that they were truly exchanged (f), or that one of the parties got the bills which he holds merely to secure his relief. When one or other of these facts is established, the right of either party must depend on the fulfilment of his obligation under the counter bill or note, since it is the only value that he gave. If neither party negotiates the documents, no claim can be made on either of them, as they neutralize each other. If one of them is transferred to a third party, the original party who retains the other cannot claim on it, except in so far as he pays the counter docu-

(a) In *ex parte Clanricarde*, Cooke, B. L. 182, there were documents of this kind on both sides. *Vide* also *Buckler v. Buttivant*, note (c).

(b) *Ex parte Beaufay*, Cooke, 180.

(c) *Vide ex parte Maydwell*, Cooke, B. L. 180. In *Buckler v. Buttivant*, 3 East. 72, certain bills were held to be given in exchange for each other, although one of them differed a few shillings from the amount of the counter bill, although another corresponded in amount, not with any one counter bill, but with two bills taken together; and though there was a difference of five shillings between the opposite sides of the account; which sum, how-

ever, was paid at the time, as was said, to finish the transaction. There was also a difference of a few days between the periods when some of the counter bills respectively fell due. But the account, as contained in the books of the parties, showed that none of the bills had been granted for any other consideration but for each other, and the correspondence between the parties proved that they were mutual accommodations.

(d) Bayley, 430.

(e) *Cowley v. Dunlop*, 7 T. R. 565.

(f) *Vide Buckler v. Buttivant*, note (c).

ment. If both are negotiated, each party must retire the document for which he was properly bound; and the mutual obligations will thus be extinguished. When each party is acceptor or granter of the bill or note which he has bound himself to retire, the possession, by each, of his own note or acceptance, will be sufficient to show that the transaction is closed. But if the other party is acceptor or granter, and the real debtor's obligation is contained in a separate missive, the acceptor or granter, being primary obligant *ex facie* of the bill or note, ought, for his own safety, to get possession of it, and is thereupon bound to grant an acknowledgment that it was paid by the other party, which will prove the implement of his obligation.

These rules, which have been stated on the supposition of each party continuing solvent, are also applicable, under some modifications, on the bankruptcy of both or either of them.

Cross-bills
in bankruptcy.

In England, the original doctrine as to all cross-bills appears to have been, that each bill constituted an absolute debt from the time of granting it; and that therefore each party was entitled to prove against the other party's estate, on the bill which he held, whether he had fulfilled his obligations on the other or not (*a*). Accordingly, the holder of each bill was allowed to prove for it under the debtor's commission of bankruptcy, even though he had not been required to pay the other bill (*b*). This could only have been allowed on the supposition of each bill being an absolute debt before the bankruptcy; because, otherwise, it would have resolved into an ordinary contingent debt, which, till the 49 Geo. III. c. 121, could not in any case be proved under the commission. But at last the Court of Chancery exerted its equitable powers in determining, that, though the holder of such a bill or note might prove, the dividends set apart for him must be suspended till he discharged his obligations on the counter document (*c*). It has been

(*a*) Cullen, 133-4. This doctrine is implied in *Rolfe v. Caslon*, 2 H. Bl. 570, and *Cowley v. Dunlop*, 7 T. R. 565.

(*b*) *Ex parte Maydwell*, Cooke, 180; *ex parte Bloxham*, 8 Ves. 231.

(*c*) *Ex parte Bloxham*, note (*b*); Bayley, 424-5. The same principle was applied in *Sarratt v. Austin*, 4 Taunt. 204, where it was held, that

the claim on such a document, being neither an absolute debt nor a future debt, under the 7 Geo. I. c. 31, but altogether a contingent debt, could not support a petition for a commission of bankruptcy. The authority of this case was recognised in *Solarte ex parte*, 2 D. and Ch. 261, where it was decided, that the assignees of a party who had got a third party's ac-

doubted (*a*) whether such bills can even be proved till the counter bills have been retired; and it has been remarked (*b*), that if they may be proved, and a dividend set apart for them, on the ground of their forming an absolute debt, on the same ground the dividend ought to be paid, whether the counter document has been retired or not. But the later authorities seem to lead to the result, that they may be proved, although the dividends on them will be suspended (*c*).

In Scotland we have escaped from these difficulties by considering such securities from the first as contingent debts, depending each on payment of the other, but allowing them, like other contingent debts, to be ranked, and to have dividends set apart for them, though not to be paid till the condition becomes absolute (*d*). The holder of such a security, if he has indorsed it to a third party, seems entitled to retain any debts due by him to the other party, till he is relieved from his liability on the bill or note thus indorsed, which the other party is bound to retire. Some difficulties, however, have arisen in the application of these simple principles; and the decisions in the few cases which have occurred, as they proceeded on separate grounds, can scarcely be said to have established any fixed rule.

In the first case (*e*), bills accepted by one party for another party's accommodation, had been transferred by the latter to third parties; and the acceptor, on the other hand, retained counter notes, which the other party had granted to him, in his own possession. These notes, therefore, while in his hands, were merely securities for his relief from his own acceptances. Although they appeared

*Nairne v.
Cranstoun.*

ceptances from a house (the drawer's), in return for acceptances of his to them, which were not fully paid, though a composition on them was drawn from his estate, could not prove on the acceptances which he held against the estate of the drawers. As the bills which formed the consideration for giving these acceptances had been ranked on the same estate, it was held, that to rank them also on it while the counter acceptances were unpaid, would have been to rank the same debt twice.

(*a*) Cooke, 183. *Vide* also three cases to the same effect, cited *ibid.*, viz. *ex parte Curtis*, *ex parte Lee*, and *ex parte Brown*. The last case, and two other cases to the same effect, viz. *ex parte Everett*, and *ex parte Ward*, are also cited in *Sarratt v. Austin*, 4 Taunt. 204.

(*b*) Cullen, 134, note 48.

(*c*) *Vide* note (*c*), p. 582.

(*d*) *Gibb v. Brock*, 12 May 1838, 16 S. 1002.

(*e*) *Nairne v. Cranstoun*, 13 May 1796, M. 2597.

to relate to a separate debt, they did in fact relate to the same debt, and could have no more effect in the holder's favour, with reference to it, than a simple letter of relief to him from the other party. Such a letter could not have given him a claim against the other party, unless so far as he paid the debt; and on the other party's bankruptcy, and the holder of the negotiated bills ranking for their full amount on his estate, no such missive, whether in the form of a counter note or a letter of relief, could entitle him, as mere surety, to rank again for the same debt. But the decision seems to have involved this principle of double ranking. Laidlaw, one of the parties, had accepted bills for the accommodation of Forrester and Company, who, on the other hand, granted him their promissory-notes for the same sums. Both parties failed, Forrester and Company having previously indorsed away Laidlaw's acceptances for value, but Laidlaw retaining their notes. The holders of the acceptances ranked for their amount on Laidlaw's estate, from which they drew 10s. *per* pound, and also on the estate of Forrester and Company, from which it was supposed that they would draw 5s. more. On the other hand, Laidlaw's trustee having claimed to be ranked on Forrester and Company's estate for their promissory-notes, it was objected that Forrester and Company, having already ranked the holder of the bills, as principal creditor, for their full amount, could not be bound to rank Laidlaw, who was merely surety, a second time for the same debt; the notes, it was said, being only obligations of relief to him for that debt, though apparently distinct documents. On these grounds, Forrester and Company's trustee pleaded that they were entitled to retain the dividends corresponding to the promissory-notes, unless Laidlaw's trustee relieved their estate altogether from the ranking on his acceptances, by paying their full amount; in which case he would be entitled to rank as surety in place of the holders of these acceptances. But the Court of Session decided that the notes must be ranked for their full amount. The soundness of this decision has been questioned by some of the Court in a recent case (*a*), as well as by a learned author (*b*), and it appears to be extremely doubtful.

(*a*) *Newbigging and Company's Trustee v. Heywood, Collins, and Company's Trustee*, 12 Nov. 1823, 2 S. 481.

(*b*) 1 Bell, 528.

If the promissory-notes related to the same debt with Laidlaw's acceptances, and formed merely an obligation to relieve him from them, his trustee could not rank on them, more than on a clause of relief on a bond, in his right as surety, while the holder of the bills was ranked on the same estate for the same debt as principal creditor. It was said that, if the notes were not ranked, Forrester and Company's estate, having drawn full value for the bills, would profit to the extent of 10s. *per* pound, received by the holders of the bills from Laidlaw's estate, besides the 5s. *per* pound of shortcoming on their own estate, which was only to pay 5s. *per* pound on the bills ; so that thus their estate must have gained 15s. *per* pound by taking Laidlaw's acceptances, without giving value in return. But this argument would have been equally applicable, although Laidlaw, instead of getting the notes, had got merely a counter obligation of relief ; in which case he would equally have benefited Forrester and Company's estate, without receiving ultimately any value in return. The value which he took for the bills was an obligation of relief, in the form of a promissory-note, which was intended, if both parties had remained solvent, to enable him, on paying the acceptances, to make good his relief to the full amount. But it could not have been meant, as it would have been a fraud on the granter's other creditors, to set up these notes, with a view to his failure, as fictitious securities, under which the holder or his creditors might claim for their full amount on the granter's estate, though they had only paid a small dividend on the acceptances, which formed the consideration for them. As Laidlaw received the notes only as sureties for the acceptances, neither he nor his creditors could rank for them, while the holder of the acceptances ranked for them on the same estate. The only fair result would have been that adopted in England under similar circumstances, viz. that the dividends on the notes from the granter's estate should have been suspended, till Laidlaw's creditors relieved the granter's estate from the bills, in which event his creditors would rank on the notes, as coming in place of the bills.

Another of these cases alluded to (a), though decided by the Court of Session prior to the case now mentioned, was decided subsequently to it in the House of Lords. In this case, three several

*Curtis v.
Chippendale.*

(a) *Curtis and Others v. Chippendale*, 9 Dec. 1794, decided by the House of Lords on 23d Feb. 1797, Morr. 2589, 3 Pat. App. 540.

houses, M'Alpine and Company in Scotland, and Livesay, Hargrave, and Company, and Lewis and Potter, both of London, agreed to exchange bills to support each other's credit. Accordingly, M'Alpine and Company gave bills to both the other houses, drawn by themselves, and accepted, either by some of their correspondents, or by a fictitious firm assumed by themselves. Many of these bills Livesay, Hargrave, and Company, and Lewis and Potter indorsed to their bankers, Gibson and Johnson, in security of advances made to them. On the other hand, both these houses, viz. Livesay and Co., and Lewis and Potter, gave M'Alpine and Company a number of bills drawn by them respectively on Gibson and Johnson, by whom they were accepted. But it is a circumstance which has been overlooked, till it was first noticed by a late author (*a*), that M'Alpine and Company gave either cash or good bills, which were regularly paid, for nearly the full amount of Gibson and Johnson's acceptances which they received (*b*); and that thus they were onerous holders of these acceptances, independently of all claim on the other bills which they had given. In these circumstances, all the four houses already mentioned having become bankrupt, the holders of the bills accepted by Gibson and Johnson, which M'Alpine and Company had received from the two other houses and indorsed away, ranked for them on Gibson and Johnson's estate; and, on the other hand, Gibson and Johnson's assignees claimed on the estate of M'Alpine and Company for those bills which the latter had given to Livesay, Hargrave, and Company, or Lewis and Potter, and which these two houses had indorsed for value to Gibson and Johnson. But the holders of Gibson and Johnson's acceptances, besides ranking on their estate as acceptors, had likewise ranked for them on the estate of M'Alpine and Company as indorsers; and therefore the trustee of M'Alpine and Company pleaded retention of the dividends claimed by Gibson and Johnson's assignees on their bills, in order to relieve M'Alpine and Company's estate from the dividend with which they were burdened for Gibson and Johnson's acceptances, and for which the

(*a*) Glen, 2d edition, 369.

(*b*) This fact is stated in detail, both in the memorial for M'Alpine and Co.'s Trustee, in the Court of Session, and

in his case as respondent in the House of Lords, p. 2, and is not denied by the other parties.

latter were the proper debtors. The majority of the Court of Session sustained this plea of retention, holding that, with reference to Gibson and Johnson's acceptances, M'Alpine and Company were in the condition of cautioners, and were thus entitled to make good their claim of relief from these acceptances, by retaining, in security of it, any debt due by them to the principal debtor. The Court therefore deducted from Gibson and Johnson's claim against M'Alpine and Company's estate, the dividend which the latter had paid on account of the acceptances of the former, and ranked Gibson and Johnson only for the balance. But the House of Lords reversed this judgment, by repelling the plea of retention, and ordering that Gibson and Johnson's assignees should be ranked for their full claim. It does not appear distinctly on what ground this reversal proceeded; but there were some special pleas in the case which render it not improbable that it proceeded on them, rather than on the general grounds that have been sometimes supposed. One special ground of argument was strongly urged in the appeal, viz. that as this was a claim between one bankrupt estate in Scotland and another in England, it ought to be regulated by the bankrupt laws of these two countries; that the bankrupt laws of both countries then coincided on this subject, inasmuch as the English bankrupt law excluded all claims which were not due at the time of the act of bankruptcy, and consequently excluded this contingent claim by M'Alpine and Company, while the Scotch Bankrupt Act, 23 Geo. III. c. 18, under which the sequestration of M'Alpine and Company was awarded, declares, § 22, "That the whole estate, whether personal or real, belonging to the bankrupt at the period of the sequestration, shall become a fund of division among those who were his creditors prior to the date of the application, *and none else*, according to their due order of preference;" and which statute, although it elsewhere, § 34, provides for debts payable after the sequestration, does not include contingent claims. Thus, as was argued, there was no ground for pleading compensation or retention, on the claim of relief in question, against Gibson and Johnson's estate, since it could not be made available against them by the bankrupt law either of Scotland or England. This was the argument urged most strongly by the appellant; and it is not unlikely that it influenced the judgment, more especially as

that judgment is not proved to have proceeded on any of the reasons generally assigned for it. It has been said (*a*), in explanation of the judgment, that to have allowed M'Alpine and Company's claim for relief from Gibson and Johnson's acceptances to form a ground of set-off against the claim of the latter, would have been to rank these acceptances twice on their estate, since the holders of the acceptances had already ranked for them. It may, however, be answered, that M'Alpine and Company did not, by the proceeding in question, *rank* on Gibson and Johnson's estate, but merely exercised a right of retention over a debt which they themselves owed to these parties, in order to secure their claim of relief. There could not, indeed, have been room for retention, if M'Alpine and Company had, as has been supposed, merely received Gibson and Johnson's acceptances from Livesay, Hargrave, and Company, in exchange for their own bills, under the agreement for mutual accommodations. They might, no doubt, have pleaded their claim of indemnity as a ground for withholding payment of their own bills, while in the hands of Livesay, Hargrave, and Company; because these bills, so long as Livesay, Hargrave, and Company retained them, were merely guarantees of their relief from their own counter acceptances, and could not therefore be so employed by them till they had retired these acceptances. But when these bills were indorsed by Livesay, Hargrave, and Company for value, they became to the holders vouchers of debt independent of the counter bills; and as they were granted at first, as well as these counter bills, for the purpose of being negotiated, it was part of the original agreement that each party should retire his own bills from the holders, without reference to the counter bills. This obligation was in part discharged as to the bills given by Livesay, Hargrave, and Company, by ranking them on the estate of Gibson and Johnson, the acceptors. But they were also ranked on the estate of M'Alpine and Company, as indorsers; and the question was, what claim of relief M'Alpine and Company had for this payment. Now, they could have no such claim, except in so far as they had got the bills onerously; and if they had acquired them only in consideration of their own counter bills, their right could not be onerous, till they fulfilled the condition on which the bills were obtained, by paying

(*a*) 1 Bell, 530.

a dividend on their own bills, which had been given as a consideration for them. They could not therefore, on the supposition now stated, have withheld the dividends on their own bills from Gibson and Johnson, to secure their relief from Gibson and Johnson's acceptances, because it was only on paying these dividends that they became onerous holders of Gibson and Johnson's acceptances, so as to acquire such a right of relief. The observations, therefore, of a learned author (*a*) on this subject would be well founded, if M'Alpine and Company had given no value for Gibson and Johnson's acceptances received by them from the London houses, excepting their own counter acceptances. But it has been shown that they had given full value for most of Gibson and Johnson's acceptances in cash and good bills, independently altogether of their own counter bills; and as their estate had paid a dividend on these acceptances, for which the acceptors were properly liable, it would appear that, when the latter claimed dividends from them on any other bills, they were entitled to retain these dividends in security of their relief for what they had thus paid. This was not to rank again on Gibson and Johnson's estate, but to use a security which was in their own hands. The preference which it gave them over the other creditors did not afford an argument against it more than against any other preferable security. It seems to have been merely an example of that right of retention which every cautioner may employ for his own relief; and therefore if the question had been tried at present, on general principles, instead of being influenced by the peculiar terms of the 23 Geo. III., combined with the English bankrupt law, it would perhaps have had a different issue. These remarks, however, are proposed with the greatest diffidence, considering the different construction which has been hitherto given to the ultimate judgment in this case.

From what has been already stated, it appears that, so long as a party receiving one bill in consideration of another keeps it in his own hands, there is no difference between his claim on it, and the claim of relief which he would have, at any rate, as surety, on being obliged to take up the other bill, except that the counter bill supercedes other proof of his claim of relief under the other bill. This

(*a*) 1 Bell, 530-1. See some further observations on the case in *Christie v. Keith*, 29 June 1838, 16 S. 1224.

appears to be the case, even when bills are given expressly in exchange for each other. But if each party, without an exchange, express or implied, merely gives to the other a number of bills for his behoof, which are entered to their respective accounts, and one party negotiates the bills given him, while the other retains a number of his, the latter cannot use the retained bills even as a constitution of his claim of relief from the negotiated bills, but must claim on these last bills merely as surety; the respective sets of bills not being then considerations for each other, but each party being only surety on the bills which he gives, and entitled to claim as such. In a case of this kind, where one party negotiated almost all the bills that he got from the other, which, accordingly, were afterwards ranked on the estates of both parties, while the other party retained a number of the bills that he had received, he was not allowed to rank on them against the other party's estate, even to the effect of making good the loss that his estate had incurred by receiving much less accommodation than it gave, but his claim was held to be merely one of suretyship on his bills given to the other party; and it was decided, that even for this claim he could not rank on the other party's estate, unless he had satisfied the whole of these bills, as the holders had been already ranked on them against both estates (*a*). This decision was given before the 49 Geo. III. c. 21, § 8, repeated by 6 Geo. IV. c. 16, § 52, which allow sureties to rank for relief against their principal's estate. But, besides, these Acts apply only where the surety has paid the whole debt, or a part in discharge of the whole, in which case the principal creditor can only rank for the balance. They do not authorize the surety to rank when the creditor has merely drawn a dividend from his estate, while he has ranked separately against the principal debtor's estate for the whole debt; for this would be to allow a double ranking (*b*). The principles of this decision are therefore the same that would be adopted in Scotland. In such a case, in adjusting accounts between the parties, the bad bills on

(*a*) *Ex parte Walker*, 4 Ves. 373; Cooke, B. L. 184. Vide also Bayley, 432-3, who elicits the true principles of this intricate case. A similar decision was given, under like circum-

stances, in *ex parte Earle*, 5 Ves. 833, and in *Solarte ex parte*, 2 D. and Ch. 261.

(*b*) Bayley, 433.

either side must be thrown out of view, because these resolve on both sides into cautionary obligations, which cannot be ranked against either estate, so long as the principal debts are ranked. In a later case (*a*), indeed, it was held by the highest authority, that if there is a surplus on one of the estates, after paying all the bills ranked against it, the other estate may rank on that surplus for the cross-bills ranked on it, so far as the sum exacted from it on account of them has exceeded the sum paid on account of the corresponding bills from the other estate. In two later cases, also, this doctrine was recognised (*b*). But if there is no surplus, the balance provable by one party against the other can only be struck on account of the cash or good bills given. This rule was adopted in another case (*c*), where, in estimating the cash balance between two estates, L.1098 of bills given to one party by the other, which had turned out bad, were struck out of the account. But as these bills were entirely for the accommodation of the party in whose favour the cash balance stood, so that he was bound to retire them, instead of doing which he had allowed them to be ranked for a dividend on the other party's estate, that estate was authorized to retain the dividend on the cash balance due by it in relief of these dividends (*d*). When bills are accepted to a party, either expressly or

(*a*) *Rawson ex parte*, per Lord Eldon, Chancellor, 1 Jac. C. C. 279.

(*b*) *La Forest ex parte*, 2 D. and Ch. 199; also in *Solarte ex parte*, 3 D. and Ch. 416, 1 Mont. and Ayr. 270, where it was decided that the assignees of parties who had got acceptances of third parties from the drawers, in consideration of their acceptances to the latter, were entitled, though their acceptances had not been fully paid, but had been ranked on the estates of all the parties, to rank the acceptances in their hands on the estate of the acceptors, but retaining the dividends till the counter acceptances were fully paid, that their estate might be indemnified from these dividends, for a surplus of the payment from their estate over the payments from the other estates.

(*c*) *Ex parte Metcalf*, 11 Ves. 404.

(*d*) *Ibid.* Vide also Bayley, 353-4.

Professor Christian suggests (ii. 393) that the retention on the dividend of the cash balance in this case would be ineffectual; because, after it was retained, it would fall to be divided among the holders of the very bills against which it was meant to indemnify the estate, as well as among the other creditors. His solution of the case is, 1st, That the bills for L.1098, so far as they corresponded with the cash balance, should have been considered as granted in discharge of it; so that, as the party receiving them had indorsed them for value given for them from a third party, the ranking of these bills by the holder on the drawer's estate ought to have been held equivalent to his author's ranking for the cash balance, and should therefore have discharged his claim for that balance. 2dly, He suggests, that, in

by implication, on account of a cash balance due to him, and these bills, having been indorsed away, are ranked by the holders on the acceptor's estate, it has been held that the indorser cannot rank on the same estate for his cash balance, because that would be to rank him twice for the same debt, as the bills, for which he has got value, are ranked in his right (a).

It has been mentioned, that, when bills on opposite sides of an account differ in amount or other particulars, they will not be presumed, without strong additional evidence, to have been given for each other. The Court of Session proceeded on this principle, in holding that bills which differed from each other in various particulars, although entered on opposite sides of an account between the parties respectively granting them, could not be held as considerations for each other (b), and that, therefore, although one of the

so far as the bills exceeded the cash balance, the drawer should have been considered as cautioner for the party receiving them, and should therefore have had a claim against him in his character for any dividend which he had paid. Such a claim in Scotland would be extinguished by a discharge under the sequestration. This solution proceeds on the *hypothesis* that the bills had not been granted altogether for the receiver's accommodation, but in extinction of the cash balance, so far as this balance corresponded with them.

In *ex parte Walker*, p. 590, note (a), a cash balance was allowed to be ranked, without setting it aside to answer the dividends paid on bills received by the party in whose favour the balance stood, and which that party was bound to have retired. But the other party had received counter accommodations to a much greater amount, which had been also ranked on the estate of the party granting them, and therefore the one much more than counter-balanced the other. The account on which the cash balance arose was distinct from the account of these mutual accommodations, being composed, not of them, but either of advances in cash, or of such bills as were duly honoured.

The bills in question, therefore, did not form any part of the consideration given for this cash balance, since they did not enter into the account on which it arose, but were inserted in a separate account. Hence there does not seem to be good ground for the objection which has been stated to this judgment, 2 Christian, 389-90, viz. that, to allow the cash balance to be proved, was to allow a proof both of the bills in question and of the consideration given for them. No doubt the objection stated by the learned author would be unanswerable, if the bills in question had been granted, not as mutual accommodations, entered in a distinct account, but in consideration of money due by the party granting to the party receiving them; for, in that case, it would be unjust, that, while third parties holding these bills ranked for them on the estate of the party granting them, the original receiver of them should also rank for his cash balance, which had been *pro tanto* discharged by his receiving these very bills. But what has been now stated appears to show that this was not the case.

(a) *Read ex parte*, 1 Gl. and Jam. 224.

(b) *Newbigging and Company's Tru-*

parties had paid the full balance due on the one set of bills, he could not claim, for his relief from that balance, on the other bills which were in his possession retired. One of these bills thus retired was a bill for L.1500, in which the other party, being acceptors, were *ex facie* primary obligants, though it was really granted for the accommodation of the party receiving it; and though he had acknowledged this by a counter-missive, in which he engaged to furnish funds for retiring it, he pleaded that this was merely an obligation of relief, which could not be allowed to qualify the *prima facie* liability of the acceptors, till they performed their counter obligations to him, by indemnifying him for his payments on account of their bills. But the successful answer was, that he had performed the obligation, of which he now wished to suspend the performance, by retiring the bill; and that, being thus extinguished by the proper debtor, it could not be revived to any effect whatever.

When a person, though he has none of the drawer's effects in his hands, accepts a bill, not on his account, but on account of a third party, who has got value from him, the acceptance is not considered as one for the drawer's accommodation, but he holds it onerously, and has the same claim on it, against the acceptor or his estate, that he would have had against the party on whose account it was made, and in whose situation the acceptor has thus placed himself (a).

3. *Effect of Bankrupt's Discharge.*

A bankrupt under sequestration may be discharged in Scotland from all claims, either certain or contingent, arising from obligations contracted prior to the sequestration, whether ranked under the sequestration or not. Such a discharge is granted by authority of the Court, either on a contract by the bankrupt to pay a certain composition approved of by nine-tenths of the creditors in number and value who have claimed, when proposed at the time and in the

In sequestration.

tee v. Heywood, Collins and Co.'s Trustees, 12 Nov. 1823, 2 S. 481, F. C. Session Papers.

I.

(a) *Ex parte Marshall*, 1 Atk. 131, per Lord Hardwicke; *ex parte Matthews*, 6 Ves. 285, Bayley, 354.

2 P

manner specified in the statute (*a*), or, failing that, by his whole creditors; or, without such a composition, on an application made by the bankrupt, after a certain time, with concurrence of the trustee and four-fifths of the creditors in number and value (*b*). But the debtor may, notwithstanding such a discharge of his debts, revive any of them by subscribing a bill or note for its amount (*c*). A discharge granted to a company as indorsers of a bill, and to the individual partners, cannot release one of these partners, who was also partner of a company that had accepted the bill, from his obligation as an individual partner of the acceptors (*d*).

In process of
cessio bonorum.

Failing a discharge, the bankrupt can only have the privilege of *cessio bonorum*, which does not discharge him from his debts, but merely releases him from personal diligence, on his surrendering all his effects to his creditors. To bankrupts who are not or cannot be sequestrated, this is the only remedy which the law allows, except the voluntary and individual discharge of each creditor.

A decree of *cessio* cannot be effectual to the debtor against the holder of a bill of his, who has not been cited, though the bill did not fall due till after the cause had been called, and though the debtor did not know that the bill was in the hands of the actual holder, till he received a charge from him, which was also after the cause had been in Court (*e*).

(*a*) 54 Geo. III. c. 137, §§ 59, 60.

(*b*) *Ibid.* § 61.

(*c*) *Hunter v. Lindsay*, 31 Jan. 1835, 13 S. 390; *Grimshaw v. Malcolm*, 4 June 1842, 4 D. 1360.

(*d*) *Sharpe v. Simson*, 11 July 1829, 7 S. and D. 901.

(*e*) *Veitch v. Campbell and Co.*, 28 Nov. 1821, 1 S. and B. 173.

A P P E N D I X .

I.—STATUTES.

CAP. 20.—*Act concerning Bills of Exchange.*—September 16, 1681.

1681, c. 20.

OUR Sovereigne Lord, considering how necessary it is for the flourishing of trade, that bills or letters of exchange be duely payed and have ready execution, conforme to the custome of other parts, doeth therefore, with advice and consent of his Estates of Parliament, statute and ordain, that in case of any forraign bill of exchange, from or to this realm duely protested for not acceptance, or for not payment, the said protest having the bill of exchange prefixed, shall be registrable within six moneths after the date of the said bill in case of non-acceptance, or after the falling due thereof in case of non-payment, in the Books of Council and Session or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer, or indorser, in case of an protest for non-acceptance, or against the acceptor, in case of a protest for non-payment, to the effect it may have the authority of the judges thereof, interponed thereto, that letters of horn-ing upon a simple charge of six dayes, and executorials necessary may pass thereupon, for the whole sums contained in the bill, as well exchange as principal, in forme as effeirs, sicklike, and in the same manner, as upon registrat bonds, or decreets of registration, proceeding upon consent of parties. Providing alwayes, that if the saids protests be not duly registrat within six moneths, in manner above provided, then and in that case, the saids bills and protests, are not to have summar execution, but only to be pursued by way of ordinary action, as accords. And farther, it is hereby statute and enacted, that the sums contained in all bills of exchange, bear annual-rent in case of not acceptance from the date thereof, and in case of acceptance and not payment from the day of their falling due, ay and while the payment thereof. And farther his Majesty with advice foresaid, hereby declares, That notwithstanding of the fore-saids summar execution provided to follow upon bills of exchange, for the sums therein contained, in manner above specified; yet it shall be leasom to the party charger to pursue for the exchange, if not contained in the saids bills, with re-exchange, damage, interest, and all expences before the ordinary judge, or in case of suspension, to eek the same to the charge at the discussing of the said suspension, to the effect, that the same may be liquidat, and decret given therefore, either against the party principal, or against him and his cautioners, as accords.

See 1696, c. 36.

1696. c. 36.

1696, c. 36.—*Act anent Inland Bills and Precepts.*

See 12 G. 3. c.
72, §§ 36, 42, &
43.

OUR Sovereign Lord, with advice and consent of the Estates of Parliament, statutes, enacts and declares, That the same execution shall be competent, and proceed upon inland bills, or precepts, as is provided to pass upon foreign bills of exchange, by the twentieth Act of the Third Parliament, King *Charles* the Second, holden in *anno* 1681. Which Act is hereby extended to inland bills and precepts in all points.

5 G. 3. c. 49.

5 GEO. III. c. 49.—*An Act to prevent the Inconveniencies arising from the present Method of issuing Notes and Bills by the Banks, Banking Companies, and Bankers, in that part of Great Britain called Scotland.*

Summary execution may proceed upon every such note, in order to enforce payment of the principal and interest.

Method of protesting where payment is denied, etc.

No suspension to pass but upon a discharge of the note, or tender made, with all charges. Overcharge in the account of expences may be sued for at common law; as may also the damages arising from an undue delay of payment of the note.

IV. And for rendering the payment of all notes, accepted bills, post bills, tickets, tokens, or other writings, for money, of the nature of a bank or banker's note, circulated or to be circulated, as specie, in that part of the United Kingdom, more effectual, be it further enacted by the authority aforesaid, That from and after the passing of this Act, summary execution shall proceed upon every such note, accepted bill, post bill, ticket, token, or other writing, at the instance of the holder thereof, against the person or persons, bodies politick or corporate, and the legal administrators of such person or persons liable in payment of the same, not only for the sum or sums therein contained, but also for the interest thereof from the time of demanding payment; and that a protest, taken at the office of the person or persons, bodies politick or corporate, liable in payment of the same, between the hours of nine in the morning and three in the afternoon, for not payment, or for not marking of any such note, accepted bill, post bill, ticket, token, or other writing, shall be registerable in the Courts of Session, or other competent judicatories, at any time within six months after the date of such protest; that letters of horning, upon a charge of six days, and the other usual execution of the Law of *Scotland*, may pass thereupon, in the same manner as is competent by the law of *Scotland*, upon protests of bills of exchange and inland bills duly registered.

V. And be it further enacted by the authority aforesaid, That no suspension or list of such charge, or other execution, shall pass, but upon a discharge by the holder of the note or notes, accepted bills, or post bills, so protested; or upon an offer or tender made to him or her, in the form of an instrument, duly signed by a notary public and two witnesses, of the full contents of such note or notes, bill or bills, with the legal interest thereof from the date of the protest, and also of the expences of the protest, registration, and such diligence as shall have followed thereupon, to be certified by an account under the hand of the holder of such note or notes, accepted bills, post bills, or other writings, aforesaid, all in lawful money of *Great Britain*: Saving and reserving always to the person or persons, bodies politick or corporate, who shall make such payment, their action at common law, before any competent Court, for repetition of any overcharge in such account of expences, and to the person

or persons who shall have protested such note or notes, his, her, or their action, before any competent Court, for what further damages he, she, or they, may have incurred by the undue delay of payment.

5 G. 3. c. 49.

VI. And for preventing the unnecessary expence and delay of protesting each note, accepted bill, post bill, ticket, token, or other writing, aforesaid, separately, be it enacted by the authority aforesaid, That the holder of such notes, accepted bills, post bills, tickets, tokens, or other writings, after prefixing to his or her protest the full tenor and contents of any one note, accepted bill, post bill, ticket, token, or other writing aforesaid, issued by the person or persons, bodies politick or corporate, against whom such protest is to be taken, may and shall subjoin thereto the dates and numbers of all other notes or writings aforesaid, of the same tenor and contents whereof he or she shall then demand payment; which protest, being duly registered, as aforesaid, shall be sufficient warrant for issuing letters of horning, and all other execution of the law, for payment of the contents of the whole notes, accepted bills, post bills, tickets, tokens, or other writings aforesaid, so specified in the protest; any law, usage, or custom to the contrary notwithstanding.

Protest may be made of several notes jointly.

VII. And whereas a practice has of late prevailed in that part of the United Kingdom, of issuing and circulating notes as specie, of the nature of bank notes, for small sums, less than twenty shillings lawful money of *Great Britain*, whereby great inconveniences have arisen: For remedy whereof, be it further enacted by the authority aforesaid, That from and after the first day of *June*, one thousand seven hundred and sixty-five, no note, accepted bill, post bill, ticket, token, or other writing, circulated, or which may be circulated, as specie, in the manner of a bank or banker's note, shall be issued, re-issued, or given out as specie, by any person or persons, bodies politick or corporate, their servants or agents, in that part of the United Kingdom, for any sum or sums of money less than twenty shillings lawful money of *Great Britain*; any law, usage, or custom to the contrary notwithstanding: And that the person or persons, bodies politick or corporate, their servants or agents, who shall, after the said first day of *June*, issue, re-issue, or give out, any note, accepted bill, post bill, ticket, token, or other writing aforesaid, for any sum less than twenty shillings, shall, for every such offence, forfeit and pay the sum of five hundred pounds sterling, with full costs of suit, to the person or persons who shall inform or prosecute for the same; to be sued for and recovered by way of summary complaint, before the Court of Session; to be proceeded in, in manner before directed.

From and after 1 June 1765, no note to be issued, and circulated as specie, for a less sum than 20s. sterling, on forfeiture of 500*l.* with full costs of suit.

12 GEO. III. c. 72.—*An Act for rendering the Payment of the Creditors of Insolvent Debtors more equal and expeditious, and for regulating the Diligence of the Law by Arrestment and Poinding, and for extending the Privilege of Bills to Promissory Notes, and for limiting Actions upon Bills and Promissory Notes, in that Part of Great Britain called Scotland.*

12 G. 3. c. 72.

XXXVI. And whereas it would be advantageous to trade in that part of *Great Britain* called *Scotland*, that promissory notes were allowed

After May 15, 1772, promis-

12 G. 3. c. 72.
 sory notes to
 bear interest as
 bills.

No bills of ex-
 change, or pro-
 missory notes,
 executed after
 May 15, 1772,
 to be effectual
 to produce dili-
 gence, unless
 such diligence
 shall be used
 before the ex-
 piration of six
 years.

Bills of ex-
 change, etc.,
 granted before
 May 15, 1772,
 to be subject to
 the above limi-
 tation.

Bank bills not
 comprehended
 under the
 above limita-
 tion.

Years of mino-
 rity not to be
 computed.

Promissory
 notes and in-
 land bills to be
 protested as
 foreign bills.

* See 19 & 20
 V. c. 60, §§ 13
 and 14.

the like summary execution and other privileges with bills, be it there-
 fore enacted by the authority aforesaid, That from and after the fifteenth
 day of *May*, one thousand seven hundred and seventy-two, the same
 diligence and execution shall be competent, and shall proceed upon pro-
 missory notes, whether holograph or not, as is provided to pass upon
 bills of exchange and inland bills by the law of *Scotland*, and that pro-
 missory notes shall bear interest as bills, and shall pass by indorsation;
 and that indorsees of promissory notes shall have the same privileges as
 indorsees of bills in all points.

XXXVII. And whereas the not limiting bills and promissory notes
 to a moderate endurance in that part of *Great Britain* called *Scotland* has
 been found by experience to be attended with great inconveniences; for
 remedy whereof, be it enacted by the authority aforesaid, That no bill
 of exchange, or inland bill, or promissory note, executed after the fif-
 teenth day of *May*, one thousand seven hundred and seventy-two, shall
 be of force, or effectual to produce any diligence or action in that part of
Great Britain called *Scotland*, unless such diligence shall be raised and
 executed, or action commenced thereon, within the space of six years
 from and after the terms at which the sums in the said bills or notes
 became exigible.

XXXVIII. And be it further enacted, That no bill of exchange, or
 inland bill, or promissory note, which has been or shall be granted before
 the said fifteenth day of *May*, one thousand seven hundred and seventy-
 two, shall be of force, or effectual to produce any diligence or action,
 unless such diligence has been or shall be raised, or action has or shall
 be commenced thereon before the expiration of six years, from and after
 the said fifteenth day of *May*, one thousand seven hundred and seventy-
 two.

XXXIX. Provided always, That no notes, commonly called *bank notes*
 or *post bills* issued or to be issued by any bank or banking company, and
 which contain an obligation of payment to the bearer, and are circulated
 as money, shall be comprehended under the aforesaid limitation or pre-
 scription; and that it shall and may be lawful and competent, at any
 time after the expiration of the said six years, in either of the cases
 before mentioned, to prove the debts contained in the said bills, and pro-
 missory notes, and that the same are resting and owing by the oaths or
 writs of the debtor.

XL. And it is hereby enacted and declared, That the years of the
 minority of the creditors, in such notes or bills, shall not be computed in
 the said six years.

XLI. And it is further enacted and declared, That all inland bills
 and promissory notes shall be protested in like manner as foreign bills
 before the expiration of the three days of grace, otherwise there shall be
 no recourse against the drawers or indorsers of such inland bills, or
 against the indorsers of such promissory notes; and it shall be sufficient
 to preserve the said recourse, if notice is given of the dishonour within
 fourteen days after the protest is taken, without prejudice to the notifica-
 tion of the dishonour of foreign bills, to be made within such time as is
 required by the usage and custom of merchants.*

XLII. And be it further enacted by the authority aforesaid, That from and after the said fifteenth day of *May*, one thousand seven hundred and seventy-two, summary execution, by horning, or other diligence, shall pass upon bills, whether foreign or inland, and whether accepted or protested for non-acceptance, and upon all promissory notes duly negotiated, not only against the accepters of such bills, or grantors of such notes, but also against the drawers of such bills, and the whole indorsers of the said bills and notes jointly and severally, excepting where the indorsation is qualified to be without recourse, saving and reserving to the drawers or indorsers their respective claims of recourse against each other, and all defences against the same, according to law.

12 G. 3. c. 72.

After May 15, 1772, summary execution, by horning, shall pass upon bills, etc.

XLIII. And be it also enacted by the authority aforesaid, That from and after the said fifteenth day of *May*, one thousand seven hundred and seventy-two, summary execution by horning, or other diligence, shall be competent to the indorsee of a bill, although the protest is not in the name of the indorsee craving the diligence; and although the bill is not re-conveyed to him by indorsation, if he produces a receipt for the value by act of honour, or a missive letter from the protesting indorsee, mentioning the dishonour agreeable to the practice of merchants in returned bills.

After May 15, 1772, summary execution by horning, shall be competent to the indorsee.

XLIV. And be it further enacted by the authority aforesaid, That that present Act shall continue, and be in force for seven years, from the said fifteenth day of *May*, one thousand seven hundred and seventy-two, and to the end of the then next session of Parliament, and no longer.

The Act to continue for 7 years.

23 GEO. III. c. 18.—*An Act for rendering the Payment of Creditors more equal and expeditious, in that Part of Great Britain called Scotland; and for making perpetual so much of an Act, made in the twelfth Year of his present Majesty's Reign, as relates to Bills and Promissory Notes.*

23 G. 3. c. 18.

LV. And whereas it hath been found by experience, that so much of the said Act, made in the twelfth year of the reign of his present Majesty, as relates to bills and promissory notes, hath been of great advantage to the trade and commerce of that part of *Great Britain* called *Scotland*, be it therefore enacted, That so much, and such part of the said Act, shall be, and the same is hereby made perpetual.

So much of the Act 12 Geo. III. as relates to bills and promissory notes made perpetual.

31 GEO. III. c. 25.—*An Act for repealing the Duties now charged on Bills of Exchange, Promissory Notes, and other Notes, Drafts, and Orders, and on Receipts; and for granting other Duties in lieu thereof.*

31 G. 3. c. 25.

XIX. And be it further enacted by the authority aforesaid, That all vellum, parchment, and paper, liable to any stamp duty by this Act, shall, before any of the matters or things hereby charged shall be ingrossed, printed, or written thereupon, be brought to the head office for stamping or marking vellum, parchment, or paper; and the said commissioners by themselves, or by their officers employed under them, shall and may,

Vellum, etc. to be stamped before written upon, etc.

- 31 G. 3. c. 25. from time to time, stamp and mark as this Act directs, any quantities or parcels of vellum, parchment, or paper, before any of the matters or things hereby charged shall be ingrossed, printed, or written thereupon, upon payment of the several duties payable for the same by virtue of this Act; and no bill of exchange, promissory note, or other note, draft, or order, nor any receipt, discharge, acquittance, note, memorandum, or writing aforesaid, liable to the duties by this Act imposed, or any of them, shall be pleaded or given in evidence in any Court,* or admitted in any Court to be good, useful, or available in law or equity, unless the vellum, parchment, or paper, on which such bill of exchange, promissory note, or other note, draft, or order, receipt, discharge, acquittance, note, memorandum, or writing as aforesaid, shall be ingrossed, printed, written, or made, shall be stamped or marked with a lawful stamp or mark, to denote the rate of duty as by this Act is directed, or some higher rate or duty in this Act contained; and it shall not be lawful for the said commissioners, or their officers, to stamp or mark any vellum, parchment, or paper, with any stamp or mark directed to be used or provided by virtue of this Act, at any time after any bill of exchange, promissory note, or other note, draft, or order, or any receipt, discharge, or acquittance, except as herein is otherwise provided, shall be ingrossed, written, or printed thereon, under any pretence whatever;† any thing in this Act contained, or any law or statute to the contrary thereof notwithstanding.
- * See 17 & 18 V. c. 83, § 27.
- † See 37 G. 3. c. 136, §§ 5 & 6.

G. 3. c. 136. 37 GEO. III. c. 136.—*An Act to enable the Commissioners of Stamp Duties to stamp Deeds, and other Instruments, Bills of Exchange, Promissory and other Notes, in the Cases therein mentioned.*—[20th July 1797.]

31 Geo. 3, c. 25, recited.

Bills of exchange, etc. made after passing this Act, liable to stamp duty under recited Act, if on stamps of an

V. And whereas by an Act, passed in the thirty-first year of the reign of his present Majesty, intituled, *An Act for repealing the Duties now charged on Bills of Exchange, Promissory Notes, and other Notes, Drafts, and Orders, and on Receipts, and for granting other Duties in lieu thereof*, certain stamp duties were imposed on bills of exchange, promissory notes, and other notes respectively; and it was thereby enacted, that all vellum, parchment, and paper, before any bill of exchange, promissory note, or other note, liable to any stamp duty by the said Act imposed, should be engrossed, printed, or written thereon, should be brought to the head office for stamping such vellum, parchment, and paper; and that it should not be lawful for the commissioners for managing the duties on stamped vellum, parchment, and paper, or their officers, to stamp any vellum, parchment, or paper, at any time after any bill of exchange, promissory note, or other note, draft, or order, should be written thereon, under any pretence whatsoever: Be it further enacted, That it shall and may be lawful for any person or persons, who shall be the holder or holders of any bill of exchange, promissory note, or other note, draft, or order, made after the passing of this Act, and liable to any stamp duty by virtue of the said recited Act, which shall be stamped with a stamp of a different denomination than is required by the said Act, if the same shall be of equal or superior value to the stamp required, to produce the

same, or cause the same to be produced, within the respective times hereinafter mentioned, to the commissioners appointed to manage the said duties, at the head office of stamps in *Middlesex*, or to such officer or officers as the said commissioners, or the major part of them, shall, by writing under their hands, appoint for such purpose; and it shall and may be lawful for such commissioners to direct the proper officer or officers, and such officer or officers is and are hereby required, upon payment of the duty payable on such vellum, parchment, or paper, by the said recited Act, and such penalty as is hereinafter mentioned, over and above the said duty, to mark or stamp such bill of exchange, promissory note, or other note, draft, or order, with the proper mark or stamp, and to give a receipt for the duty and penalty so paid on the back of such bill of exchange, promissory note, or other note, draft, or order, so stamped; and every such bill of exchange, promissory note, or other note, draft, or order, so stamped, shall have and be deemed of the like force and validity in the law, as if the same had been duly stamped according to the directions of the said recited Act; and all and every person or persons procuring such bill of exchange, promissory note, or other note, draft, or order, to be stamped as directed by this Act, shall be and is and are hereby indemnified, freed, and discharged from and against all penalties and forfeitures incurred by reason of such bill of exchange, promissory note, or other note, draft, or order, not having been duly stamped according to the directions of the said Act.*

VI. And be it further enacted, That if any such bill of exchange, promissory note, or other note, draft, or order, shall be produced to the said commissioners before the same shall be payable according to the tenor and effect thereof, the same shall be stamped on payment of the said duty, and the penalty of forty shillings; but in case such bill of exchange, promissory note, or other note, draft, or order, shall be payable, according to the tenor and effect thereof, before the production thereof to the said commissioners for the purpose before mentioned, then the same shall not be stamped, unless on payment of the duty and the sum of ten pounds for the said penalty.

55 GEO. III. C. 184.—*An Act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies and Successions to personal Estate upon Intestacies, now payable in Great Britain; and for granting other Duties in lieu thereof.*—[11th July 1815.]

VIII. And be it further enacted, That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains, and penalties, contained in and imposed by the several Acts of Parliament relating to the duties hereby repealed, and the several Acts of Parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matters and things, charged or chargeable therewith, as far as the same are or shall be applicable, in all cases

37 G. 3. c. 186.

equal or superior value, though of different denominations than the legal stamps, may be properly stamped, on payment of the duty, and a penalty.

* See 55 G. 3. c. 184, §§ 10 & 11.

Penalty to be paid on stamping said bills; 40s. if before the bill is payable; 10l. afterwards.

55 G. 3. c. 184.

Powers, etc. of former Acts extended to Act.

55 G. 3. c. 184. not hereby expressly provided for, and shall be observed, applied, enforced and put in execution for the raising, levying, collecting and securing of the said duties hereby granted and otherwise relating thereto, so far as the same shall not be superseded by, and shall be consistent with the express provisions of this Act, as fully and effectually to all intents and purposes, as if the same had been herein repeated and specially enacted with reference to the said duties hereby granted.

Instruments having wrong stamps, but of sufficient value, valid.

X. And be it further enacted, That, from and after the passing of this Act, all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law; except in cases where the stamp or stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof.

Exception.

Making, etc. bills of exchange, etc. not duly stamped.

XI. And be it further enacted, That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, or shall accept or pay, or cause or permit to be accepted or paid, any bill of exchange, draft or order, or promissory note for the payment of money, liable to any of the duties imposed by this Act, without the same being duly stamped for denoting the duty hereby charged thereon, he, she or they shall, for every such bill, draft, order or note, forfeit the sum of fifty pounds.

Penalty.

Post dating bills of exchange, etc.

XII. And be it further enacted, That if any person or persons shall make and issue, or cause to be made and issued, any bill of exchange, draft or order, or promissory note for the payment of money, at any time after date or sight, which shall bear date subsequent to the day on which it shall be issued, so that it shall not in fact become payable in two months, if made payable after date, or in sixty days, if made payable after sight, next after the day on which it shall be issued, unless the same shall be stamped for denoting the duty hereby imposed on a bill of exchange and promissory note for the payment of money at any time exceeding two months after date, or sixty days after sight, he, she or they shall, for every such bill, draft, order or note, forfeit the sum of one hundred pounds.

Penalty.

Issuing unstamped drafts on bankers, without specifying place where issued, or if post dated.

XIII. And, for the more effectually preventing of frauds and evasions of the duties hereby granted on bills of exchange, drafts or orders for the payment of money, under colour of the exemption in favour of drafts or orders upon bankers or persons acting as bankers, contained in the Schedule hereunto annexed, be it further enacted, That if any person or persons shall, after the thirty-first day of *August* one thousand eight hundred and fifteen, make and issue, or cause to be made and issued, any bill, draft or order, for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this Act, the person or persons so offending

shall, for every such bill, draft or order, forfeit the sum of one hundred pounds; and if any person or persons shall knowingly receive or take any such bill, draft or order, in payment of or as a security for the sum therein mentioned, he, she or they shall, for every such bill, draft or order, forfeit the sum of twenty pounds; and if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft or order, shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post dated, or knowing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not in any other respect fall within the said exemption, then the banker or bankers, or person or persons so offending, shall, for every such bill, draft or order, forfeit the sum of one hundred pounds, and moreover shall not be allowed the money so paid or any part thereof, in account against the person or persons, by or for whom such bill, draft or order, shall be drawn, or his, her or their executors or administrators, or his, her or their assignees or creditors in case of bankruptcy or insolvency, or any other person or persons claiming under him, her or them.

55 G. 3. c. 184.

Penalty.

Receiving, etc.
such drafts.

Penalty.

Bankers pay-
ing them.

Penalty.

XIV. And be it further enacted, That, from and after the thirty-first day of *August* one thousand eight hundred and fifteen, it shall be lawful for any banker or bankers, or other person or persons,* who shall have made and issued any promissory notes for the payment to the bearer on demand, of any sum of money not exceeding one hundred pounds each, duly stamped according to the directions of this Act, to re-issue the same from time to time, after payment thereof, as often as he, she or they, shall think fit, without being liable to pay any further duty in respect thereof; and that all promissory notes, so to be re-issued as aforesaid, shall be good and valid, and as available in the law, to all intents and purposes, as they were upon the first issuing thereof.

Promissory
notes to bearer
on demand, not
exceeding
100*l.* re-issued
by original
makers, with-
out further
duty.

* See 7 & 8 V.
c. 32, § 10.

XV. And be it further enacted, That no promissory note for the payment to the bearer on demand, of any sum of money not exceeding one hundred pounds, which shall have been made and issued by any bankers or other persons in partnership, and for which the proper stamp duty shall have been once paid according to the provisions of this Act, shall be deemed liable to the payment of any further duty, although the same shall be re-issued by and as the note of some only of the persons who originally made and issued the same, or by and as the note of any one or more of the persons who originally made and issued the same, and any other person or persons in partnership with him or them jointly; nor although such note if made payable at any other than the place where drawn, shall be re-issued with any alteration therein only of the house or place at which the same shall have been at first made payable.

Such notes not
liable to
further duty,
though re-
issued by cer-
tain persons
not strictly the
original
makers.

XVIII. And be it further enacted,† That, from and after the thirty-first day of *August* one thousand eight hundred and fifteen, it shall not be lawful for any banker or bankers, or other person or persons, to issue any promissory note for the payment of money to the bearer on demand, liable to any of the duties imposed by this Act, with the date printed therein; and if any banker or bankers, or other person or persons, shall issue or cause to be issued any such promissory note with the date

Issuing notes
in future with
printed dates.

† See 23 & 24
V. c. 111, § 19.

55 G. 3. c. 184.
Penalty.
Promissory
notes made out
of G. B. not
negotiable un-
less stamped.

Circulating,
etc. such notes,
etc.

Penalty.
Proviso for
Ireland.

printed therein, he or they shall, for every promissory note so issued, for
feit the sum of fifty pounds.

XXIX. And be it further enacted, That, from and after the passing
of this Act, promissory notes for the payment of money to the bearer on
demand, made out of *Great Britain*, or purporting to be made out of
Great Britain, or purporting to be made by or on the behalf of any
person or persons resident out of *Great Britain*, shall not be negotiable
or be negotiated, or circulated or paid in *Great Britain*, whether the same
shall be made payable in *Great Britain*, or not, unless the same shall have
paid such duty, and be stamped in such manner, as the law requires for
promissory notes of the like tenor and value made in *Great Britain*; and
if any person or persons shall circulate or negotiate, or offer in payment,
or shall receive or take in payment any such promissory note, or shall
demand or receive payment of the whole or any part of the money men-
tioned in such promissory note, from or on account of the drawer thereof,
in *Great Britain*, the same not being duly stamped as aforesaid; or if any
person or persons in *Great Britain* shall pay or cause to be paid the sum
of money expressed in any such note, not being duly stamped as afore-
said, or any part thereof, either as drawer thereof, or in pursuance of
any nomination or appointment for that purpose therein contained, the
person or persons so offending shall, for every such promissory note, for-
feit the sum of twenty pounds: Provided always, that this clause shall
not extend to promissory notes made and payable only in *Ireland*.

SCHEDULE TO WHICH THIS ACT REFERS.

Inland Bill of Exchange, Draft or Order to the Bearer, or
to Order, either on Demand or otherwise, not exceeding
Two Months after Date, or Sixty Days after Sight, of any
Sum of Money.*

* See 17 & 18 V.
c. 83; Sched.

Amounting to 40s. and not exceeding £5, 5s., . . .	£0	1	0
Exceeding £5, 5s. and not exceeding £20, . . .	0	1	6
Exceeding £20 and not exceeding £30, . . .	0	2	0
Exceeding £30 and not exceeding £50, . . .	0	2	6
Exceeding £50 and not exceeding £100, . . .	0	3	6
Exceeding £100 and not exceeding £200, . . .	0	4	6
Exceeding £200 and not exceeding £300, . . .	0	5	0
Exceeding £300 and not exceeding £500, . . .	0	6	0
Exceeding £500 and not exceeding £1000, . . .	0	8	6
Exceeding £1000 and not exceeding £2000, . . .	0	12	6
Exceeding £2000 and not exceeding £3000, . . .	0	15	0
Exceeding £3000, . . .	1	5	0

Inland Bill of Exchange, Draft or Order for the Payment
to the Bearer, or to Order, at any time exceeding Two
Months after Date, or Sixty Days after Sight, of any
Sum of Money.†

† See 17 & 18 V.
c. 83; Sched.

Amounting to 40s. and not exceeding £5, 5s., . . .	£0	1	6
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Exceeding £5, 5s. and not exceeding £20,	.	.	£0	2	0	55 G. 8. c. 184.
Exceeding £20 and not exceeding £30,	.	.	0	2	6	—
Exceeding £30 and not exceeding £50,	.	.	0	3	6	
Exceeding £50 and not exceeding £100,	.	.	0	4	6	
Exceeding £100 and not exceeding £200,	.	.	0	5	0	
Exceeding £200 and not exceeding £300,	.	.	0	6	0	
Exceeding £300 and not exceeding £500,	.	.	0	8	6	
Exceeding £500 and not exceeding £1000,	.	.	0	12	6	
Exceeding £1000 and not exceeding £2000,	.	.	0	15	0	
Exceeding £2000 and not exceeding £3000,	.	.	1	5	0	
Exceeding £3000,	.	.	1	10	0	

Inland Bill, Draft or Order for the payment of any Sum of Money though not made payable to the Bearer, or to Order, if the same shall be delivered to the Payee, or some Person on his or her behalf, { The same duty as on a bill of exchange for the like sum, payable to bearer or order.

Inland Bill, Draft or Order for the Payment of any Sum of Money, Weekly, Monthly, or at any other stated Periods, if made payable to the Bearer, or to Order, or if delivered to the Payee, or some Person on his or her behalf, where the total Amount of the Money thereby made payable shall be specified therein, or can be ascertained therefrom, { The same duty as on a bill payable to bearer or order on demand for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite, . . . { The same duty as on a bill on demand for the sum therein expressed only.

And the following instruments shall be deemed and taken to be inland bills, drafts, or orders, for the payment of money within the intent and meaning of this schedule ; *videlicet*,

All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money ; where such drafts or orders shall require the payment or delivery to be made to the bearer, or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

55 G. 3. c. 184.

And all bills, drafts or orders, for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee or some person on his or her behalf.

Foreign Bill of Exchange (or Bill of Exchange drawn in but payable out of *Great Britain*) if drawn singly and not in a Set. { The same duty as on an inland bill of the same amount and tenor.

* See 17 & 18 V. c. 83; Sched.	Foreign Bills of Exchange, drawn in Sets according to the Custom of Merchants, for every Bill of each Set, where the Sum made payable thereby shall not exceed £100,* .	£0	1	6
	And where it shall exceed £100 and not exceed £200,	0	3	0
	And where it shall exceed £200 and not exceed £500,	0	4	0
	And where it shall exceed £500 and not exceed £1000,	0	5	0
	And where it shall exceed £1000 and not exceed £2000,	0	7	6
	And where it shall exceed £2000 and not exceed £3000,	0	10	0
	And where it shall exceed £3000,	0	15	0

Exemptions from the preceding and all other Stamp Duties.

35 G. 3. c. 94.

All bills of exchange, or bank post bills, issued by the governor and company of the bank of *England*.

All bills, orders, remittance bills and remittance certificates, drawn by commissioned officers, masters and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the Act passed in the 35th year of his Majesty's reign, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All bills drawn pursuant to any former Act or Acts of Parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon, and payable by the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the buisness of a banker, within ten miles of the place

where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes.*

55 G. 3. c. 184.

All bills, for the pay and allowances of his Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed or hereafter to be prescribed by his Majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army depot, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymaster-ship during a vacancy, or the absence, suspension or incapacity of any such paymaster as aforesaid; *save and except such bills as shall be drawn in favour of contractors or others, who furnish bread or forage to his Majesty's troops, and who by their contracts or agreements shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.*

* See 16 & 17 V.
c. 59.

Promissory Note, for the Payment, to the *Bearer on Demand*, of any Sum of Money,

Not exceeding one pound and one shilling, . . .	£0	0	5
Exceeding £1, 1s. and not exceeding £2, 2s., . . .	0	0	10
Exceeding £2, 2s. and not exceeding £5, 5s., . . .	0	1	3
Exceeding £5, 5s. and not exceeding £10, . . .	0	1	9
Exceeding £10 and not exceeding £20, . . .	0	2	0
Exceeding £20 and not exceeding £30, . . .	0	3	0
Exceeding £30 and not exceeding £50, . . .	0	5	0
Exceeding £50 and not exceeding £100, . . .	0	8	6

Which said notes may be re-issued, after payment thereof, as often as shall be thought fit.

Promissory Note for the Payment, *in any other manner than to the Bearer on Demand*, but not exceeding Two Months after Date, or Sixty Days after Sight, of any Sum of Money,†

Amounting to 40s. and not exceeding £5, 5s., . . .	£0	1	0
Exceeding £5, 5s. and not exceeding £20, . . .	0	1	6
Exceeding £20 and not exceeding £30, . . .	0	2	0
Exceeding £30 and not exceeding £50, . . .	0	2	6
Exceeding £50 and not exceeding £100, . . .	0	3	6

These notes are not to be re-issued after being once paid.

† See 17 & 18 V.
c. 88; Sched.

55 G. 8. c. 184. Promissory Note for the Payment, *either to the Bearer on Demand, or in any other manner than to the Bearer on Demand*, but not exceeding Two Months after Date, or Sixty Days after Sight, of any Sum of Money,*

* See 17 & 18 V.
c. 83; Sched.

Exceeding £100 and not exceeding £200,	.	.	£0	4	6
Exceeding £200 and not exceeding £300,	.	.	0	5	0
Exceeding £300 and not exceeding £500,	.	.	0	6	0
Exceeding £500 and not exceeding £1000,	.	.	0	8	6
Exceeding £1000 and not exceeding £2000,	.	.	0	12	6
Exceeding £2000 and not exceeding £3000,	.	.	0	15	0
Exceeding £3000,	.	.	1	5	0

The notes are not to be re-issued after being once paid.

Promissory Note for the Payment to the Bearer or otherwise, at any time exceeding Two Months after Date, or Sixty Days after Sight, of any Sum of Money,†

† See 17 & 18 V.
c. 83; Sched.

Amounting to 40s. and not exceeding £5, 5s.,	.	.	£0	1	6
Exceeding £5, 5s. and not exceeding £20,	.	.	0	2	0
Exceeding £20 and not exceeding £30,	.	.	0	2	6
Exceeding £30 and not exceeding £50,	.	.	0	3	6
Exceeding £50 and not exceeding £100,	.	.	0	4	6
Exceeding £100 and not exceeding £200,	.	.	0	5	0
Exceeding £200 and not exceeding £300,	.	.	0	6	0
Exceeding £300 and not exceeding £500,	.	.	0	8	6
Exceeding £500 and not exceeding £1000,	.	.	0	12	6
Exceeding £1000 and not exceeding £2000,	.	.	0	15	0
Exceeding £2000 and not exceeding £3000,	.	.	1	5	0
Exceeding £3000,	.	.	1	10	0

These notes are not to be re-issued after being once paid.

Promissory Note for the Payment of any Sum of Money by Instalments, or for the Payment of several Sums of Money at different Days or Times, so that the whole of the Money to be paid shall be definite and certain,

The same duty as on a promissory note, payable in less than two months after date for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule; viz.

All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the

bearer, or to order, and if the same shall be definite and certain, and not amount in the whole to twenty pounds.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited.

Exemptions from the Duties on Promissory Notes.

All notes, promising the payment of any sum or sums of money out of any particular fund, which may or may not be available ; or upon any condition or contingency, which may or may not be performed or happen ; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments, bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon, as agreements or otherwise.

Exemptions from the preceding and all other Stamp Duties.

All promissory notes for the payment of money, issued by the governor and company of the Bank of England.

Protest of any Bill of Exchange or Promissory Note, for any Sum of Money,*

* See 24 & 25 V. c. 91, § 25.

Not amounting to £20,	£0	2	0
Amounting to £20 and not amounting to £100,	0	3	0
Amounting to £100 and not amounting to £500,	0	5	0
Amounting to £500 or upwards,	0	10	0

Protest of any other kind,	0	5	0
And for every sheet or piece of paper, parchment or vellum, upon which the same shall be written, after the first, a further <i>progressive</i> duty of	0	5	0

1 & 2 G. 4. c. 78.

1 AND 2 GEO. IV. c. 78.—*An Act to regulate Acceptances of Bills of Exchange.*—[2d July 1821.]

Bills accepted payable at a banker's or other place, deemed a general acceptance.

Bills accepted payable at a banker's or other place only, deemed a qualified acceptance.

Acceptance to be in writing on the bill.

See 19 & 20 V. c. 60, § 11.

WHEREAS according to law as hath been adjudged, where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance: And whereas a practice hath very generally prevailed among merchants and traders so to accept bills, and the same have, among such persons, been very generally considered as bills generally accepted, and accepted without qualification: And whereas many persons have been, and may be much prejudiced and misled by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience, by giving such notice as herein-after mentioned of their intention to make only a qualified acceptance thereof; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the first day of *August* now next ensuing, if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill, payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place.

II. And be it further enacted, That from and after the said first day of *August*, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts.*

G. 4. c. 65.

9 GEO. IV. c. 65.—*An Act to restrain the Negotiation, in England, of Promissory Notes and Bills under a limited sum, issued in Scotland or Ireland.*—[15th July 1828.]

7 G. 4. c. 6.

WHEREAS an Act was passed in the seventh year of his present Majesty's reign, intituled *An Act to limit, and after a certain period to prohibit, the issuing of Promissory Notes under a limited sum in England*; and doubts may arise how far the provisions of the said Act may be effectual to restrain the circulating in *England* of certain notes, drafts, or undertakings made or issued in *Scotland* or *Ireland*: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if any body politic or corporate, or person or persons, shall, after the fifth day of *April* one thousand eight hundred and twenty-nine, by any art, device,

After 5th April 1829, no corporation or person shall

or means whatsoever, publish, utter, negotiate, or transfer, in any part of *England*, any promissory or other note, draft, engagement, or undertaking in writing, made payable on demand to the bearer thereof, and being negotiable or transferable, for the payment of any sum of money less than five pounds, or on which less than the sum of five pounds shall remain undischarged, which shall have been made or issued, or shall purport to have been made or issued, in *Scotland* or *Ireland*, or elsewhere out of *England*, wheresoever the same shall or may be payable, every such body politic or corporate, or person or persons, so publishing, uttering, negotiating, or transferring any such note, bill, draft, engagement, or undertaking, in any part of *England*, shall forfeit and pay for every such offence, any sum not exceeding twenty pounds nor less than five pounds, at the discretion of the justice of the peace who shall hear and determine such offence.

9 G. 4. c. 65.

utter in England notes or bills under 5*l.* which have been made or issued in Scotland or Ireland, under penalty of 20*l.*

II. And be it further enacted, That the penalties which may be incurred under the provisions of this Act shall and may be recovered in a summary way, by information on complaint, before a justice or justices of the peace, and shall be levied and applied in the manner directed by an Act passed in the forty-eighth year of the reign of his late Majesty King *George* the Third, intituled, *An Act to restrain the Negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum in England*, with respect to the penalties by the said last-mentioned Act imposed; and all and every the clauses and provisions in the said last-mentioned Act contained, relating to the recovery and application of the penalties thereby imposed, shall be applied and put in execution for the recovery and application of the penalties by this Act imposed, as fully and effectually to all intents and purposes, as if such clauses and provisions had been herein repeated and expressly re-enacted.

Mode of recovering penalties.

48 G. 3. c. 88.

III. Provided always, and be it enacted, That it shall and may be lawful for the Lord High Treasurer, or for the Commissioners of his Majesty's Treasury, or any three or more of them, to order and direct that the whole or any part of any penalty which shall be incurred under this Act shall and may be remitted, or mitigated or abated to such amount, and in such manner and upon such conditions as to such Lord High Treasurer or Commissioners of the Treasury may seem fit and proper.

The Treasury may order a remission or mitigation of penalties.

IV. Provided always, and be it further enacted, That nothing herein contained shall extend to any draft or order drawn by any person or persons on his, her, or their banker or bankers, or on any person or persons acting as such banker or bankers, for the payment of money held by such banker or bankers, person or persons, to the use of the person or persons by whom such draft or order shall be drawn.

Not to extend to drafts on bankers for the use of the drawer.

2 AND 3 WILL. IV. c. 98.—*An Act for regulating the protesting for Non-payment of Bills of Exchange drawn payable at a Place not being the Place of the Residence of the Drawee or Drawees of the same.*—[9th August 1832.]

2 & 3 W. 4. c. 98.

WHEREAS doubts having arisen as to the place in which it is requisite to protest for non-payment bills of exchange, which on the presentment

2 & 3 W. 4. c.
98.

Bills of
exchange
expressed to be
paid in any
place other
than the resi-
dence of the
drawee, if
not accepted
on present-
ment, may
be protested
in that place,
unless
amount paid to
the holder.

for acceptance to the drawee or drawees shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and it is expedient to remove such doubts; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this Act, all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable had the same been duly accepted.

5 & 6 W. 4. c.
41.

5 AND 6 WILL. IV. c. 41.—*An Act to amend the Law relating to Securities given for Considerations arising out of gaming, usurious, and certain other illegal Transactions.*—[31st August 1835.]

16 Car. 2. c. 7.

10 Will. 3. (I.)

9 Ann. c. 14.

11 Ann. (I.)

WHEREAS by an Act passed in the sixteenth year of the reign of his late Majesty King *Charles* the Second, and by an Act passed in the Parliament of *Ireland* in the tenth year of the reign of his late Majesty King *William* the Third, each of such Acts being intituled *An Act against deceitful, disorderly, and excessive Gaming*, it was enacted, that all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which should be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for any money or other thing lost at play or otherwise as in the said Acts respectively is mentioned, or for any part thereof, should be utterly void and of none effect: And whereas by an Act passed in the ninth year of the reign of her late Majesty Queen *Anne*, and also by an Act passed in the Parliament of *Ireland* in the eleventh year of the reign of her said late Majesty, each of such Acts being intituled *An Act for the better preventing of excessive and deceitful Gaming*, it was enacted, that from and after the several days therein respectively mentioned all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities should be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as did game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place

of such play to any person or persons so gaming or betting as aforesaid, or that should, during such play, so play or bet, should be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; and that where such mortgages, securities, or other conveyances should be of lands, tenements, or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities, or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the said grantor or grantors thereof, or the person or persons so incumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same; and that all grants or conveyances to be made for the preventing of such lands, tenements, or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid should be deemed fraudulent and void and of none effect, to all intents and purposes whatsoever: And whereas by an Act passed in the twelfth year of the reign of her said late Majesty Queen *Anne*, intituled *An Act to reduce the Rate of Interest, without any Prejudice to Parliamentary Securities*, it was enacted, that all bonds, contracts, and assurances whatsoever made after the twenty-ninth day of *September* one thousand seven hundred and fourteen for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of five pounds in the hundred, as therein mentioned, should be utterly void: And whereas by an Act passed in the Parliament of *Ireland* in the fifth year of the reign of his late Majesty King *George the Second*, intituled *An Act for reducing the Interest of Money to Six per cent.*, it was enacted, that all bonds, contracts, and assurances whatsoever, made after the first day of *May* one thousand seven hundred and thirty-two, for payment of any principal or money to be lent or covenant to be performed upon or for any loan, whereupon or whereby there should be taken or reserved above the rate of six pounds in the hundred, should be utterly void: And whereas by an Act passed in the fifty-eighth year of the reign of his late Majesty King *George the Third*, intituled *An Act to afford Relief to the bona fide Holders of negotiable Securities without Notice that they were given for a usurious Consideration*, it was enacted, that no bill of exchange or promissory note that should be drawn or made after the passing of that Act should, though it might have been given for a usurious consideration or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the time of discounting or paying such consideration for the same actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration or upon a usurious contract: And whereas by an Act passed in the Parliament of *Ireland* in the eleventh and twelfth years of the reign of his said late Majesty King *George the Third*, intituled *An Act to prevent Frauds committed by Bankrupts*, it was enacted, that every bond, bill, note, contract, agreement, or other security whatsoever to be made or given by any bankrupt or by any other person

5 & 6 W. 4. c. 41.

12 Ann. st. 2. c. 16.

5 G. 2. (1.)

58 G. 3. c. 93.

11 & 12 G. 3. (1.)

5 & 6 W. 4. c.
41.

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45 G. 3. c. 72.

6 G. 4. c. 16.

Securities
given for con-

unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt and such bankrupt's discharge, as a consideration or to the intent to persuade him, her, or them to consent to or sign any such allowance or certificate, should be wholly void and of no effect, and the monies there secured or agreed to be paid should not be recovered or recoverable : And whereas by an Act passed in the forty-fifth year of the reign of his said late Majesty King *George* the Third, intituled *An Act for the Encouragement of Seamen, and for the better and more effectually manning his Majesty's Navy during the present War*, it was enacted, that all contracts and agreements which should be entered into, and all bills, notes, and other securities which should be given, by any person or persons for ransom of any ship or vessel, or of any merchandize or goods on board the same, contrary to that Act, should be absolutely null and void in law, and of no effect whatsoever : And whereas by an Act passed in the sixth year of the reign of his late Majesty King *George* the Fourth, intituled *An Act to amend the Laws relating to Bankrupts*, it was enacted, that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt, at his bankruptcy, as a consideration, or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue, and give that Act and the special matter in evidence : And whereas securities and instruments made void by virtue of the several herein-before recited Acts of the sixteenth year of the reign of his said late Majesty King *Charles* the Second, the tenth year of the reign of his said late Majesty King *William* the Third, the ninth and eleventh years of the reign of her said late Majesty Queen *Anne*, the eleventh and twelfth years of the reign of his said late Majesty King *George* the Third, the forty-fifth year of the reign of his said late Majesty King *George* the Third, and the sixth year of the reign of his said late Majesty King *George* the Fourth, and securities and instruments made void by virtue of the said Act of the twelfth year of the reign of her said late Majesty Queen *Anne*, and the fifth year of the reign of his said late Majesty King *George* the Second, other than bills of exchange or promissory notes made valid by the said Act of the fifty-eighth year of the reign of his said late Majesty King *George* the Third, are sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given : And the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice : For remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That so much of the herein-before recited Acts of the sixteenth year of the reign of his said

late Majesty King *Charles* the Second, the tenth year of the reign of his said late Majesty King *William* the Third, the ninth, eleventh, and twelfth years of the reign of her said late Majesty Queen *Anne*, the fifth year of the reign of his said late Majesty King *George* the Second, the eleventh and twelfth and the forty-fifth years of the reign of his said late Majesty King *George* the Third, and the sixth year of the reign of his said late Majesty King *George* the Fourth, as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill, or mortgage which if this Act had not been passed would, by virtue of the said several lastly herein-before mentioned Acts or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several Acts shall have the same force and effect which they would respectively have had if instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration: Provided always, that nothing herein contained shall prejudice or affect any note, bill, or mortgage which would have been good and valid if this Act had not been passed.

II. And be it further enacted, That in case any person shall, after the passing of this Act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the herein-before recited Acts of the sixteenth year of the reign of his said late Majesty King *Charles* the Second, the tenth year of the reign of his said late Majesty King *William* the Third, and the ninth and eleventh years of the reign of her said late Majesty Queen *Anne*, or by any one or more of such Acts, declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage, the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of his Majesty's Courts of Record.

III. And be it further enacted, That so much of the said Acts of the ninth and eleventh years of the reign of her said late Majesty Queen *Anne* as enacts that where such mortgages, securities, or other conveyances as therein mentioned should be of lands, tenements, or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities, or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the grantor or grantors thereof, or the person or persons incumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same, and that all grants or conveyances to be made for

5 & 6 W. 4. c. 41.

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siderations arising out of illegal transactions not to be void, but to be deemed to have been given for an illegal consideration.

Money paid to the holder of such securities shall be deemed to be paid on account of the person to whom the same was originally given.

Repealing so much of recited Acts of 9 & 11 Ann. as enacts that securities shall enure for the benefit of parties in remainder.

5 & 6 W. 4. c.
41.

the preventing of such lands, tenements, or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid, should be deemed fraudulent and void and of none effect, to all intents and purposes whatsoever, shall be and the same is hereby repealed; saving to all persons all rights acquired by virtue thereof previously to the passing of this Act.

Act may be
altered this
session.

IV. And be it further enacted, That this Act may be altered or repealed by any other Act during this present session of Parliament.

6 & 7 W. 4. c.
58.

6 AND 7 WILL. IV. C. 58.—*An Act for declaring the Law as to the Day on which it is requisite to present for Payment to the Acceptors or Acceptor supra Protest for Honour, or to the Referees or Referee in case of need, Bills of Exchange which had been dishonoured.*—[13th August 1836.]

Bills of ex-
change need
not be pre-
sented to
acceptors for
honour or
referees till
the day fol-
lowing the
day on which
they become
due.

WHEREAS bills of exchange are occasionally accepted supra protest for honour, or have a reference thereon in case of need: And whereas doubts have arisen when bills have been protested for want of payment as to the day on which it is requisite that they should be presented for payment to the acceptors or acceptor for honour, or to the referees or referee, and it is expedient that such doubts should be removed; be it therefore declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That it shall not be necessary to present such bills of exchange to such acceptors or acceptor for honour, or to such referees or referee, until the day following the day on which such bills of exchange shall become due; and that, if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town, or place other than in the city, town, or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill of exchange shall become due.

If the follow-
ing day be a
Sunday, etc.,
then on the
day follow-
ing such
Sunday, etc.

II. And be it further enacted and declared, That if the day following the day on which such bill of exchange shall become due shall happen to be a *Sunday, Good Friday, or Christmas Day*, or a day appointed by his Majesty's proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill of exchange shall be presented for payment, or be forwarded for such presentment for payment, to such acceptors or acceptor for honour, or referees or referee, until the day following such *Sunday, Good Friday, Christmas Day*, or solemn fast or day of thanksgiving.

1 & 2 V. c. 114.

1 AND 2 VICT. C. 114.—*An Act to amend the Law of Scotland in Matters relating to Personal Diligence, Arrestments, and Poindings.*—[16th August 1838.]

WHEREAS it is expedient to improve the form and to diminish the expense of the diligence of the law in *Scotland* against the persons of

debtors, and to amend the law as to the diligence of arrestment and poinding: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the thirty-first day of *December* one thousand eight hundred and thirty-eight, where an extract shall be issued of a decree or act pronounced or to be pronounced by the Court of Session, or by the Court of Commission for Teinds, or by the Court of Justiciary, or of a decree proceeding upon any deed, decree arbitral, bond, protest of a bill, promissory note, or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the books of Council and Session or of the Court of Justiciary, the extractor shall, in terms of the schedule (Number 1.) hereunto annexed (or as near to the form thereof as circumstances will permit), insert a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind, and for that purpose to open shut and lockfast places; which extract shall be subscribed and prepared in other respects as extracts are at present subscribed and prepared, and for which extract no higher fees shall be exigible than those which are payable as by law established.

1 & 2 V. c. 114.

Extracts of Court of Session, Teind Court, and Court of Justiciary decrees to contain warrant to arrest, charge, and poind.

IX. And be it enacted, That from and after the said thirty-first day of *December*, where an extract shall be issued of any decree or act pronounced or to be pronounced by any sheriff, or of a decree proceeding upon any deed, decree arbitral, bond, protest of a bill, promissory note, or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the Sheriff Court books, the extractor shall, in terms of the schedule (Number 6.) hereunto annexed (or as near thereto as circumstances will permit), insert therein a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind according to the present practice, and, if need be for the purpose of poinding, to open shut and lockfast places; which extract shall be subscribed and prepared in other respects as extracts are at present subscribed and prepared, and for which extracts no higher fees shall be exigible than those which are payable as by law established; and where an extract has been issued from the books of the Sheriff before the commencement of this Act it shall be competent for the person in whose favour such extract has been issued, or the person having right thereto, to obtain an extract in terms of this Act, or a warrant subjoined to the former extract in terms of the said schedule (Number 6.), and to prosecute diligence thereon, agreeably to the provisions hereof.

Extracts of Sheriff's decrees, etc., to contain warrant to arrest, charge, poind, and open shut and lockfast places.

SCHEDULES REFERRED TO IN THE FOREGOING ACT.

No. 1.—*Warrant to be subjoined to Extracts in the Court of Session, etc.*

And the said Lords grant warrant to messengers-at-arms in her Majesty's name and authority to charge the said *A.* personally, or at his dwelling-place if within Scotland, and if furth thereof by delivering a

- 1 & 2 V. c. 114. — copy of charge at the Record Office of the keeper of the records of the Court of Session, [*state what the party is decerned to do ; if to pay money, specify the sum, interest, and expences ; or if to fulfil an obligation, specify it, as in the decree or other document,*] and that to the said *B.* [*specify the name of the person in whose favour the decree is pronounced*] within [*insert the appropriate days*] next after he is charged to that effect, under the pain of poinding and imprisonment, [*if the sum or any part thereof be payable at a future time, add here, "the terms of payment being always first come and bygone ;"*] and also grant warrant to arrest the said *A.*'s readiest goods, gear, debts, and sums of money in payment and satisfaction of the said sum, interest, and expences ; and if the said *A.* fail to obey the said charge, then to poind the said *A.*'s readiest goods, gear, and other effects, and if needful for effecting the said poinding, grant warrant to open all shut and lockfast places in form as effeirs. Extracted [*specify place and date.*] [*Extractor's Signature.*]

No. 6.—*Warrant to be subjoined to Sheriff Court Extracts.*

And I the said Sheriff grant warrant to messengers-at-arms and officers of Court to charge the said *A.* personally, or at his dwelling-place [*state what the party is decerned to do ; if to pay money, specify the sum, interest, and expences ; or if to fulfil an obligation, state the nature of it, as in the decree or other document*], and that to the said *B.* [*name of the person in whose favour the decree is pronounced,*] within [*insert the appropriate days*] next after he is charged to that effect, under the pain of poinding and imprisonment, [*if the sum or document, or any part be payable at a future time, add here, "The terms of payment being first come and bygone ;"*] and also grant warrant in satisfaction of the said sum, interest, and expences, to arrest the said *A.*'s readiest goods, debts, and sums of money ; and if the said *A.* fail to obey the said charge, then to apprise, poind, and distrain all the said *A.*'s readiest goods, gear, and other effects ; and, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places, in form as effeirs. Extracted, *etc.* [*Extractor's Signature.*]

- 7 & 8 V. c. 32. 7 AND 8 VICT. C. 32.—*An Act to regulate the issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain Privileges for a limited Period.*—[19th July 1844.]

All persons may demand of the Issue department notes for gold bullion.

IV. And be it enacted, That from and after the thirty-first day of *August* one thousand eight hundred and forty-four all persons shall be entitled to demand from the issue department of the Bank of *England* Bank of *England* notes in exchange for gold bullion, at the rate of three pounds seventeen shillings and ninepence *per* ounce of standard gold: Provided always that the said Governor and Company shall in all cases be entitled to require such gold bullion to be melted and assayed by persons approved by the said Governor and Company, at the expense of the parties tendering such gold bullion.

X. And be it enacted, That from and after the passing of this Act no person other than a banker who on the sixth day of *May* one thousand eight hundred and forty-four was lawfully issuing his own bank notes * shall make or issue bank notes in any part of the United Kingdom.

7 & 8 V. c. 82.

No new bank of issue.

* See 17 & 18 V. c. 88, § 11.

Bankers ceasing to issue notes may not resume.

XII. And be it enacted, That if any banker, in any part of the United Kingdom, who after the passing of this Act shall be entitled to issue bank notes shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank notes, either by agreement with the Governor and Company of the Bank of *England* or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes.

8 AND 9 VICT. C. 38.—*An Act to regulate the issue of Bank Notes in Scotland.*— [21st July 1845.]

8 & 9 V. c. 38.

V. And be it enacted, That all bank notes to be issued or re-issued in *Scotland* shall be expressed to be for payment of a sum in pounds sterling, without any fractional parts of a pound; and if any banker in *Scotland* shall, from and after the sixth day of *December* one thousand eight hundred and forty-five, make, sign, issue, or re-issue any bank note for the fractional part of a pound sterling, or for any sum together with the fractional part of a pound sterling, every such banker so making, signing, issuing, or re-issuing any such note as aforesaid, shall for each note so made, signed, issued, or re-issued forfeit or pay the sum of twenty pounds.

Issue of notes for fractional parts of a pound prohibited.

XV. And whereas by an Act passed in the third and fourth years of the reign of his late Majesty King *William* the Fourth, intituled *An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges for a limited Period, under certain Conditions*, it was enacted, that from and after the first day of *August* one thousand eight hundred and thirty-four, unless and until Parliament should otherwise direct, a tender of a note or notes of the Governor and Company of the Bank of *England*, expressed to be payable to bearer on demand, should be a legal tender to the amount expressed in such note or notes, and should be taken to be valid as a tender to such amount for all sums above five pounds on all occasions on which any tender of money may be legally made, so long as the Bank of *England* should continue to pay on demand their said notes in legal coin; provided always, that no such note or notes should be deemed a legal tender of payment by the Governor and Company of the Bank of *England*, or any branch bank of the said Governor and Company: And whereas doubts have arisen as to the extent of the said enactment; for removal whereof be it enacted and declared, That nothing in the said last-recited Act contained shall extend or be construed to extend to make the tender of a note or notes of the Governor and Company of the Bank of *England* a legal tender in *Scotland*: Provided always, that nothing in this Act contained shall be construed to prohibit the circulation in *Scotland* of the notes of the Governor and Company of the Bank of *England*, as heretofore.

Bank of England notes not a legal tender in Scotland.

Proviso.

XVI. And be it enacted, That all promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or trans-

Notes for less than 20s. not

8 & 9 V. c. 38.
negotiable in
Scotland.

ferable, for the payment of any sum or sums of money, or any orders, notes, or undertakings in writing, being negotiable or transferable, for the delivery of any goods, specifying their value in money less than the sum of twenty shillings in the whole, heretofore made or issued, or which shall hereafter be made or issued in *Scotland*, shall, from and after the first day of *January* one thousand eight hundred and forty-six, be and the same are hereby declared to be absolutely void and of no effect, any law, statute, usage, or custom to the contrary thereof in any wise notwithstanding; and that if any person or persons shall, after the first day of *January* one thousand eight hundred and forty-six, by any art, device, or means whatsoever, publish or utter in *Scotland* any such notes, bills, drafts, or engagements as aforesaid for a less sum than twenty shillings, or on which less than the sum of twenty shillings shall be due, and which shall be in any wise negotiable or transferable, or shall negotiate or transfer the same in *Scotland*, every such person shall forfeit and pay for every such offence any sum not exceeding twenty pounds nor less than five pounds, at the discretion of the justice of the peace who shall hear and determine such offence.

Notes of 20s.,
or above, and
less than 5l.,
to be drawn
in certain
form.

* See 26 & 27
V. c. 105.

XVII. And be it enacted,* That all promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, and which shall be issued within *Scotland* at any time after the first day of *January* one thousand eight hundred and forty-six, shall specify the names and places of abode of the persons respectively to whom or to whose order the same shall be made payable, and shall bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto, and shall be made payable within the space of twenty-one days next after the day of the date thereof, and shall not be transferable or negotiable after the time hereby limited for payment thereof, and that every endorsement to be made thereon shall be made before the expiration of that time, and to bear date at or not before the time of making thereof, and shall specify the name and place of abode of the person or persons to whom or to whose order the money contained in every such note, bill, draft, or undertaking is to be paid; and that the signing of every such note, bill, draft, or undertaking, and also of every such endorsement, shall be attested by one subscribing witness at the least; and which said notes, bills of exchange, or drafts, or undertakings in writing, may be made or drawn in words to the purport or effect as set out in the schedules to this Act annexed marked (C.) and (D.); and that all promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of twenty shillings, or any sum of money above that sum and less than five pounds, or in which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, and which shall be issued in *Scotland* at any time after the said first day of *January* one thousand eight hundred and forty-six, in any other manner than as aforesaid, and also every endorsement on any such note, bill, draft, or other

undertaking to be negotiated under this Act, other than as aforesaid, shall and the same are hereby declared to be absolutely void, any law, statute, usage, or custom to the contrary thereof in anywise notwithstanding: Provided always, that nothing in this clause contained shall be construed to extend to any such bank notes as shall be lawfully issued by any banker in *Scotland* authorized by this Act to continue the issue of bank notes.

8 & 9 V. c. 38.

XVIII. And be it enacted, That if any body politic or corporate or any person or persons shall, from and after the said first day of *January* one thousand eight hundred and forty-six, make, sign, issue, or re-issue in *Scotland* any promissory note payable on demand to the bearer thereof for any sum of money less than the sum of five pounds, except the bank notes of such bankers as are hereby authorized to continue to issue bank notes as aforesaid, then and in either of such cases every such body politic or corporate or person or persons so making, signing, issuing, or re-issuing any such promissory note as aforesaid, except as aforesaid, shall for every such note so made, signed, issued, or re-issued forfeit the sum of twenty pounds.

Penalty for persons other than bankers hereby authorized issuing notes payable on demand for less than 5*l*.

XIX. And be it enacted, That if any body politic or corporate or person or persons shall, from and after the passing of this Act, publish, utter, or negotiate in *Scotland* any promissory or other note (not being the bank note of a banker hereby authorized to continue to issue bank notes), or any bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of twenty shillings, or above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, made, drawn, or indorsed in any other manner than as is herein-before directed, every such body politic or corporate, or person or persons so publishing, uttering, or negotiating any such promissory or other note (not being such bank note as aforesaid), bill of exchange, draft, or undertaking in writing as aforesaid, shall forfeit and pay the sum of twenty pounds.

Penalty for persons, other than bankers hereby authorized, uttering or negotiating notes, bills of exchange, etc. transferable, for payment of 20*s*. or less than 5*l*.

XX. Provided always, and be it enacted, That nothing herein contained shall extend to prohibit any draft or order drawn by any person on his banker, or on any person acting as such banker, for the payment of money held by such banker or person to the use of the person by whom such draft or order shall be drawn.*

Not to prohibit checks on bankers.

XXI. And be it enacted, That all pecuniary penalties under this Act may be sued or prosecuted for and recovered for the use of her Majesty, in the name of her Majesty's Advocate-General or Solicitor-General in *Scotland*, or of the Solicitor of Stamps and Taxes in *Scotland*, or of any person authorized to sue or prosecute for the same, by writing under the hands of the Commissioners of Stamps and Taxes, or in the name of any officer of stamp duties, by action of debt, bill, plaint, or information in the Court of Exchequer in *Scotland*, or in respect of any penalty not exceeding twenty pounds, by information or complaint before one or more justice or justices of the peace in *Scotland*, in such and the same manner as any other penalties imposed by any of the laws now in force relating to the duties under the management of the Commissioners of Stamps; and it shall be lawful in all cases for the Commissioners of Stamps and Taxes,

* See 23 & 24 V. c. 111, § 19.

Mode of recovering penalties.

8 & 9 V. c. 38. either before or after any proceedings commenced for recovery of any such penalty, to mitigate or compound any such penalty, as the said Commissioners shall think fit, and to stay any such proceedings after the same shall have been commenced, and whether judgment may have been obtained for such penalty or not, on payment of part only of any such penalty, with or without costs, or on payment only of the costs incurred in such proceedings, or of any part thereof, or on such other terms as such Commissioners shall judge reasonable: Provided always, that in no such proceeding aforesaid shall any essoign, protection, wager of law, nor more than one imparlance be allowed; and all pecuniary penalties imposed by or incurred under this Act, by whom or in whose name soever the same shall be sued or prosecuted for or recovered, shall go and be applied to the use of her Majesty, and shall be deemed to be and shall be accounted for as part of her Majesty's revenue arising from stamp duties, anything in any Act contained, or any law or usage to the contrary in anywise notwithstanding: Provided always, that it shall be lawful for the Commissioners of Stamps and Taxes, at their discretion, to give all or any part of such penalties as rewards to any person or persons who shall have detected the offenders, or given information which may have led to their prosecution and conviction.

Interpretation
of Act.
* See 17 & 18
V. c. 83.

XXII. And be it enacted, That the term "bank notes"* used in this Act shall extend and apply to all bills or notes for the payment of money to the bearer on demand, other than bills and notes of the Governor and Company of the Bank of *England*; and that the term "banker" shall extend and apply to all corporations, societies, partnerships, and persons, and every individual person carrying on the business of banking, whether by the issue of bank notes or otherwise: and that the word "person" used in this Act shall include corporations; and that the word "coin" shall mean the coin of this realm; and that the singular number in this Act shall include the plural, and the plural number the singular, except where there is anything in the context repugnant to such construction; and that the masculine gender in this Act shall include the feminine, except where there is anything in the context repugnant to such construction.

SCHEDULES REFERRED TO IN THE FOREGOING ACT.

SCHEDULE (C.)

[Place] [Day] [Month] [Year]
Twenty-one days after date I promise to pay to A. B. of [place], or his
order, the sum of for value received by
Witness, E. F. C. D.
And the endorsement, toties quoties.
[Day] [Month] [Year]
Pay the contents to G. H. of [place], or his order.
Witness, J. K. A. B.

Witness, *G. H.*

A. B.

**Stamp duties
on instruments
in the
Schedule
annexed
repealed, and
others granted
in lieu.**

16 & 17 V. c.
59.

The new duties to be denominated stamp duties, and to be under the care of the Commissioners of Inland Revenue.

Powers and provisions of former Acts to be in force.

Stamps denoting the duty of one penny on receipts and drafts may be impressed or affixed.

Where adhesive stamps are used to denote the duties on receipts, drafts, or orders, the stamps to be cancelled by writing the name on it.

* See 24 & 25 V. c. 91, § 83.

Penalty for committing frauds in the use of adhesive stamps

alter any of the said stamp duties now payable in relation to any deed or instrument which shall have been signed or executed by any party thereto, or which shall bear date before or upon the tenth day of *October* one thousand eight hundred and fifty-three.

II. The said duties by this Act granted shall be denominated and deemed to be stamp duties, and shall be under the care and management of the Commissioners of Inland Revenue for the time being; and all the powers, provisions, clauses, regulations, directions, allowances, and exemptions, fines, forfeitures, pains, and penalties contained in or imposed by any Act or Acts, or any schedule thereto relating to any duties of the same kind or description heretofore payable in *Great Britain* and *Ireland* respectively, and in force at the time of the passing of this Act, shall respectively be in full force and effect with respect to the duties by this Act granted, and to the vellum, parchment, and paper, instruments, matters, and things charged and chargeable therewith, and to the persons liable to the payment of the said duties so far as the same are or shall be applicable in all cases not hereby expressly provided for, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said duties hereby granted, and otherwise in relation thereto, so far as the same shall not be superseded by, and shall be consistent with the express provisions of this Act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the said duties by this Act granted.

III. The duties of one penny by this Act granted on receipts and on drafts or orders for the payment of money respectively may be denoted either by a stamp impressed upon the paper whereon any such instrument is written, or by an adhesive stamp affixed thereto, and the Commissioners of Inland Revenue shall provide stamps of both descriptions for the purpose of denoting the said duties.

IV. In any case where an adhesive stamp shall be used for the purpose aforesaid on any receipt or upon any draft or order respectively chargeable with the duty of one penny by this Act, the person by whom such receipt shall be given or such draft or order signed or made shall, before the instrument shall be delivered out of his hands, custody, or power, cancel or obliterate the stamp so used, by writing thereon his name or the initial letters of his name so and in such a manner as to show clearly and distinctly that such stamp has been made use of, and so that the same may not be again used; and if any person who shall write or give any such receipt or discharge or make or sign any such draft or order with any adhesive stamp thereon, shall not *bonâ fide* in manner aforesaid effectually cancel or obliterate such stamp, he shall forfeit the sum of ten pounds.*

V. If any person shall fraudulently get off or remove, or cause or procure to be gotten off or removed, from any paper whereon any receipt or any draft or order shall be written, any adhesive stamp, or if any person shall affix or use any such stamp, which shall have been gotten off or removed from any paper whereon any receipt or any draft or order shall have been written, to or for any receipt, draft, or order, or any

paper whereon any such receipt, draft, or order shall be, or be intended to be written ; or if any person shall do or practise or be concerned in any fraudulent act, contrivance, or device whatever, not specially provided for by this or some other Act of Parliament, with intent or design to defraud her Majesty, her heirs or successors, of any duty by this Act granted upon receipts or upon drafts or orders, every person so offending in any of the said several cases shall forfeit the sum of twenty pounds.

16 & 17 V. c.
59.

XIX. Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof ; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any endorser thereof.

Drafts on
bankers pay-
able to order
on demand
sufficient
authority for
payment with-
out proof
of endorse-
ment.

THE SCHEDULE REFERRED TO BY THIS ACT.

	Duty.		
	£	s.	d.
Draft or order for the payment of any sum of money to the bearer or to order, on demand,	0	0	1

And the following instruments shall be deemed and taken to be drafts or orders for the payment of money within the intent and meaning of this Act, and of any Act or Acts relating to the stamp duties on bills of exchange, drafts, or orders, and shall be chargeable accordingly with the stamp duties imposed by this Act or any such Act or Acts ; viz.

All documents or writings usually termed letters of credit, or whereby any person to whom any such document or writing is or is intended to be delivered or sent, shall be entitled, or be intended to be entitled to have credit with, or in account with, or to draw upon any other person for, or to receive from such other person any sum of money therein mentioned.

Exemptions from the Duties on Drafts or Orders.

All drafts or orders for the payment of money to the bearer on demand, drawn upon any banker or bankers, now by law exempt from stamp duty.*

See 17 & 18
V. c. 88, § 7.

All letters of credit, whether in sets or not, sent by persons in the United Kingdom to persons abroad, authorizing drafts on the United Kingdom.

16 & 17 V. c.
59.

	Duty.		
	£	s.	d.
Receipt or Discharge given for or upon the payment of money amounting to two pounds or upwards,	0	0	1

Exemption.

Receipts given for money deposited in any bank, or in the hands of any banker, to be accounted for, whether with interest or not; provided the same be not expressed to be received of or by the hands of any other than the person to whom the same is to be accounted for; provided always that this exemption shall not extend to receipts or acknowledgments for sums paid or deposited for or upon letters of allotment of shares, or in respect of calls upon any scrip or shares of or in any joint stock or other company or proposed or intended company, which said last-mentioned receipts or acknowledgments, by whomsoever given, shall be liable to the duty by this Act charged on receipts.

17 & 18 V. c.
88.

17 AND 18 VICT. C. 83.—*An Act to amend the Laws relating to the Stamp Duties.*—[9th August 1854.]

I. [*Stamp duties on instruments mentioned in schedule to this Act payable under other Acts, repealed, and the duties named in said schedule granted in lieu thereof.*]

II. [*The new duties by this Act granted to be denominated stamp duties, and to be under the care of Commissioners of Inland Revenue. Powers and provisions of former Acts to be in force.*]

Duties on bills drawn out of the United Kingdom to be denoted by adhesive stamps.

III. The duties by this Act granted in respect of bills of exchange drawn out of the United Kingdom shall attach and be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated within the United Kingdom wheresoever the same may be payable, and the said duties shall be denoted by adhesive stamps, to be provided by the Commissioners of Inland Revenue for that purpose, and to be affixed to such bills as herein-after directed.

Bills purporting to be drawn abroad deemed for the purposes of this Act to be so drawn.

IV. Every bill of exchange which shall purport to be drawn at any place out of the United Kingdom shall for all the purposes of this Act be deemed to be a foreign bill of exchange drawn out of the United Kingdom, and shall be chargeable with stamp duty accordingly, notwithstanding that in fact the same may have been drawn within the United Kingdom.

The holder of a bill drawn out of the United Kingdom to affix an adhesive

V. The holder of any bill of exchange drawn out of the United Kingdom, and not having a proper adhesive stamp affixed thereon as herein directed, shall, before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill, affix thereon a proper adhesive stamp for denoting the duty by this Act charged on such bill; and

the person who shall endorse, transfer, or negotiate such bill shall, before he shall deliver the same out of his hands, custody, or power, cancel* the stamp so affixed by writing thereon his name or the name of his firm, and the date of the day and year on which he shall so write the same, to the end that such stamp may not be again used for any other purpose; and if any person shall present for payment, or shall pay or endorse, transfer or negotiate any such bill as aforesaid whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought as directed by this Act to cancel such stamp in manner aforesaid shall refuse or neglect so to do, such person so offending in any such case shall forfeit the sum of fifty pounds; and no person who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill there shall be such stamp as aforesaid affixed thereon and cancelled in the manner hereby directed.

17 & 18 V. c. 83.

stamp thereon before negotiating it. Penalty for negotiating such bill without a stamp affixed or neglecting to cancel such stamp.

* See 24 & 25 V. c. 91, § 33.

VI. If any person shall within the United Kingdom draw and issue any bill of exchange payable out of the United Kingdom purporting to be drawn in a set, and shall not draw and issue on paper duly stamped as required by law the whole number of bills which such bill purports the set to consist of, or if any person shall within the United Kingdom transfer or negotiate any such bill of exchange as aforesaid purporting to be drawn in a set, and shall not at the same time transfer or deliver on paper duly stamped as aforesaid the whole number of bills which such bill purports the set to consist of, every such person so offending in any of such cases shall forfeit the sum of one hundred pounds; and if any person shall take or receive in the United Kingdom any such bill as aforesaid, either in payment or as a security or by purchase or otherwise, without having transferred or delivered to him duly stamped as aforesaid the whole number of bills which such bill purports the set to consist of, he shall not be entitled to recover on any such bill, or to make the same available for any purpose whatever.

Penalty for drawing and issuing, or transferring or negotiating bills purporting to be drawn in a set, and not drawing the whole number of the set.

Penalty on taking or receiving such bills.

VII. And whereas, under and by virtue of certain Acts relating to stamp duties, certain drafts or orders for the payment of any sum of money to the bearer on demand, drawn upon any banker or person acting as a banker residing or transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, are exempted† from all stamp duty, and it is expedient to prevent the negotiating or circulating of such drafts or orders unstamped at any place beyond the distance of fifteen miles from the place where the same are made payable: Be it enacted that no such draft or order as aforesaid shall, unless the same be duly stamped as a draft or order, be remitted or sent to any place beyond the distance of fifteen miles in a direct line from the bank or place at which the same is made payable or be received in payment, or as a security, or be otherwise negotiated or circulated at any place beyond the said distance; and if any person shall remit or send any draft or order not duly stamped as aforesaid to any place beyond the distance aforesaid, or shall receive the same in payment or as a security,

Unstamped drafts on bankers not to be circulated beyond fifteen miles of the place where made payable.

† See 21 V. c. 20, § 1.

Penalty on persons offending.

17 & 18 V. c.
83.

Drafts law-
fully issued
unstamped
may by affix-
ing thereto
an adhesive
stamp be
negotiated
beyond the
distance of
fifteen miles.

Adhesive
stamps denot-
ing the duty
of one penny
may be used
for receipts or
drafts without
regard to
their special
appropriation.

What shall
be deemed
bank notes
within the
meanings of
7 & 8 Vict.
c. 82. and 8
& 9 Vict. cc.
88 and 37.

All bills,
drafts, and
notes deemed
bank notes
under the
above-recited
Acts liable to
stamp duties,
etc.

or in any manner negotiate or circulate the same at any such last-mentioned place, he shall forfeit the sum of fifty pounds.

VIII. Provided always, That it shall be lawful for any person who shall receive any such draft or order as aforesaid at any place within the said distance of fifteen miles from the bank or place at which the same is made payable, which draft or order shall have been lawfully issued unstamped, to affix thereto a proper adhesive stamp, and to cancel such stamp by writing thereon his name or the initial letters of his name, and thereupon such draft or order may lawfully be received and negotiated at any place beyond the distance aforesaid, anything herein contained notwithstanding.

X. The adhesive stamps provided by the Commissioners of Inland Revenue for denoting the duty of one penny payable on receipts and on drafts or orders for the payment of money to the bearer or to order on demand respectively may lawfully be used for the purpose of denoting the like amount of duty either on a receipt or on such draft or order as aforesaid, without regard to the special appropriation thereof for the other of such instruments by having its name on the face thereof, anything in any Act or Acts contained to the contrary notwithstanding.

XI. And whereas an Act was passed in the seventh and eighth years of her Majesty's reign, chapter thirty-two, to regulate the issue of bank notes; and an Act was passed in the eighth and ninth years of her Majesty's reign, chapter thirty-eight, to regulate the issue of bank notes in *Scotland*; and another Act was passed in the last-mentioned years, chapter thirty-seven, to regulate the issue of bank notes in *Ireland*; and in order to prevent evasions of the regulations and provisions of the said respective Acts it is expedient to define what shall be deemed to be bank notes within the meaning thereof respectively: Be it enacted, that all bills, drafts, or notes (other than notes of the Bank of *England*) which shall be issued by any banker or the agent of any banker for the payment of money to the bearer on demand, and all bills, drafts, or notes so issued which shall entitle or be intended to entitle the bearer or holder thereof, without endorsement, or without any further or other endorsement than may be thereon at the time of the issuing thereof, to the payment of any sum of money on demand, whether the same shall be so expressed or not, in whatever form and by whomsoever such bills, drafts, or notes shall be drawn or made, shall be deemed to be bank notes of the banker by whom or by whose agent the same shall be issued within the meaning of the said three several Acts last mentioned, and within all the clauses, provisions, and regulations thereof respectively.

XII. All bills, drafts, and notes which by or under this Act, or the said three several Acts last mentioned, or any of them respectively, are declared or deemed to be bank notes, shall be subject and liable to the stamp duties, and composition for stamp duties, imposed by or payable under any Act or Acts in force upon or in respect of promissory notes for the payment of money to the bearer on demand; and all clauses, provisions, regulations, penalties, and forfeitures contained in any Act or Acts relating to the issuing of such promissory notes, or for securing the said stamp duties and composition respectively, or for preventing or punishing frauds or

evasions in relation thereto, shall respectively be deemed to apply to all such bills, drafts, and notes as aforesaid, and to the stamp duties and composition payable upon or in respect thereof, anything in this Act, or any other Act or Acts, to the contrary notwithstanding.

17 & 18 V. c. 83.

XIII. And whereas under and by virtue of certain Acts relating to stamp duties, letters by the general post acknowledging the safe arrival of any bills of exchange, promissory notes, or other securities for money are exempted from the stamp duty granted and imposed on receipts or discharges given for or upon the payment of money: Be it enacted, that the said exemption shall be and the same is hereby repealed.

Exemption from receipt stamp duty of letters acknowledging receipt of bills, etc., repealed.

XXVII. Every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or affixed thereto.

Instruments admissible in evidence, though not properly stamped.

THE SCHEDULE TO WHICH THIS ACT REFERS.

				Duty.			
Inland Bill of Exchange, Draft, or Order for the Payment to the Bearer, or to Order, at any time otherwise than on Demand, of any sum of Money				£	s.	d.	
Not exceeding			£5	0	0	1	
Exceeding	£5 and not exceeding		10	0	0	2	
"	10	"	25	0	0	3	
"	25	"	50	0	0	6	
"	50	"	75	0	0	9	
"	75	"	100	0	1	0	
"	100	"	200	0	2	0	
"	200	"	300	0	3	0	
"	300	"	400	0	4	0	
"	400	"	500	0	5	0	
"	500	"	750	0	7	6	
"	750	"	1,000	0	10	0	
"	1,000	"	1,500	0	15	0	
"	1,500	"	2,000	1	0	0	
"	2,000	"	3,000	1	10	0	
"	3,000	"	4,000	2	0	0	
"	4,000 and upwards*			2	5	0	
Foreign Bill of Exchange drawn in, but payable out of, the United Kingdom,							
If drawn singly, or otherwise than in a set of three or more, the same duty as on an inland bill of the same amount and tenor.							
If drawn in sets of three or more, for every bill of each Set,							
Where the sum payable thereby shall not exceed				£25	0	0	1
And where it shall exceed £25 and not exceed				50	0	0	2

* See 23 V. c. 15; Sched.

17 & 18 V. c.
88.

				Duty.		
				£	s.	d.
And where it shall exceed £50 and not exceed				£75	0	0 3
	£75	„	100	0	0	4
„	100	„	200	0	0	8
„	200	„	300	0	1	0
„	300	„	400	0	1	4
„	400	„	500	0	1	8
„	500	„	750	0	2	6
„	750	„	1,000	0	3	4
„	1,000	„	1,500	0	5	0
„	1,500	„	2,000	0	6	8
„	2,000	„	3,000	0	10	0
„	3,000	„	4,000	0	13	4
„	4,000 and upwards*			0	15	0

* See 28 V. c.
15; Sched.

Foreign Bill of Exchange drawn out of the United Kingdom, and payable within the United Kingdom, the same duty as on an Inland Bill of the same amount and tenor.

Foreign Bill of Exchange drawn out of the United Kingdom, and payable out of the United Kingdom, but indorsed or negotiated within the United Kingdom, the same duty as on a Foreign Bill drawn within the United Kingdom, and payable out of the United Kingdom.†

† See *ut supra*.

Promissory Note for the payment in any other manner than to the Bearer on Demand of any sum of Money,

Not exceeding	£5	0	0	1
Exceeding £5 and not exceeding	10	0	0	2
„ 10	25	0	0	3
„ 25	50	0	0	6
„ 50	75	0	0	9
„ 75	100	0	1	0

Promissory Note for the payment, either to the Bearer on Demand or in any other manner than to the Bearer on Demand, of any sum of Money,†

† See 23 & 24
V. c. 111;
Sched.

Exceeding	£100 and not exceeding	£200	0	2	0
„ 200	„	300	0	3	0
„ 300	„	400	0	4	0
„ 400	„	500	0	5	0
„ 500	„	750	0	7	6
„ 750	„	1,000	0	10	0
„ 1,000	„	1,500	0	15	0
„ 1,500	„	2,000	1	0	0
„ 2,000	„	3,000	1	10	0
„ 3,000	„	4,000	2	0	0
„ 4,000 and upwards			2	5	0

19 AND 20 VICT. C. 25.—*An Act to amend the Law relating to Drafts on Bankers.*—[23d June 1856.]

19 & 20 V. c. 25.

WHEREAS doubts have arisen as to the obligations of bankers with respect to cross-written drafts: And whereas it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order on demand were enabled effectually to direct the payment of the same to be made only to or through some banker: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

See 21 & 22 V. c. 79.

I. In every case where a draft on any banker made payable to bearer or to order on demand bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words "and company," in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker.

Draft crossed with banker's name, etc. to be payable only to or through some banker.

II. In the construction of this Act the word "banker" shall include any person or persons, or corporation, or joint stock or other company, acting as a banker or bankers.

Construction.

19 AND 20 VICT. C. 56.—*An Act to constitute the Court of Session the Court of Exchequer in Scotland, and to regulate Procedure in matters connected with the Exchequer.*—[21st July 1856.]

19 & 20 V. c. 56.

XXXII. On the expiration of the days of charge against the crown debtor, it shall be lawful for any Sheriff, by virtue of any such extract as aforesaid, to cause poind the whole moveable effects, without exception, of such crown debtor, including bank notes, money, bonds, bills, crop, stocking, and implements of husbandry of all kinds, in or towards payment of the sums of money therein mentioned.

19 AND 20 VICT. C. 60.—*An Act to amend the Laws of Scotland affecting Trade and Commerce.*—[21st July 1856.]

19 & 20 V. c. 60.

IX. From and after the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners without the consent of the other cautioners shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt.

Discharge of one cautioner to operate as a discharge to all.

X. From and after the passing of this Act, where any bill of exchange or promissory note shall be issued without date, it shall be competent to prove by parole evidence the true date at which such bill or note was

Date of bills or notes may be proved by parole.

19 & 20 V. c.
60.

Acceptance of
bill of ex-
change must
be in writing.

All bills drawn
within the
United King-
dom, etc. on
any party
within the
United King-
dom, etc. to be
held inland
bills.

Notarial pro-
test not to be
necessary, ex-
cept for the
purpose of
summary
diligence.

Notice of dis-
honour in the
case of inland
bills to be
given as in the
case of foreign
bills.

When bill lost,
stolen, or
fraudulently
obtained,
holder must
prove value
given.

Holder of bill
or note in-
dorsed after
period of pay-
ment to be
subject to ob-
jections, etc.

issued : Provided always, that summary diligence shall not be competent on any bill or note issued without a date.

XI. No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of *December* one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

XII. Every bill of exchange drawn in any part of the United Kingdom of *Great Britain* and *Ireland*, the Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, and the islands adjacent to any of them, being part of the dominions of her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or Islands, shall be deemed to be an inland bill ; but nothing herein contained shall alter or affect the stamp duty, if any, which but for this enactment would be payable in respect of any such bill.

XIII. From and after the passing of this Act, where any inland bill of exchange shall be presented for acceptance or payment, and the same shall be dishonoured by not being accepted or paid, or where any promissory note shall be presented for payment, and dishonoured by not being paid, it shall not be necessary that a notarial protest shall be taken on such bill of exchange or promissory note in order to preserve recourse against the drawer or indorser of such bill or promissory note respectively ; but it shall be sufficient to prove such presentment and dishonour, to the effect of preserving recourse as aforesaid by other competent evidence, either written or parole : Provided always, that nothing herein contained shall be taken to affect the necessity for a notarial protest in order to entitle the holder of any bill or note to proceed with summary diligence thereon.

XIV. Where any inland bill of exchange shall be presented for acceptance or payment, and such acceptance or payment shall be refused, or where any promissory note shall be presented for payment, and payment shall be refused, notice of the dishonour of such bill or promissory note by such refusal to accept or pay shall, in order to entitle the holder to have recourse to any other party, be given in the same manner and within the same time as is required in the case of foreign bills by the law of *Scotland*.

XV. Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given by him for the same ; but such proof may be made by parole evidence.

XVI. When any bill of exchange or promissory note shall, after the passing of this Act, be indorsed after the period when such bill of exchange or promissory note became payable, the indorsee of such bill or note shall be deemed to have taken the same subject to all objections or exceptions to which the said bill or note was subject in the hands of the indorser.

21 VICT. C. 20.—*An Act for granting a Stamp Duty on certain Drafts or Orders for the Payment of Money.*—[21st May 1858.] 21 V. c. 20.

Most Gracious Sovereign,
WE, your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of *Great Britain* and *Ireland* in Parliament assembled, towards raising the supply granted to your Majesty, have freely and voluntarily resolved to give and grant unto your Majesty the stamp duty herein mentioned; and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the twenty-fourth day of *May* one thousand eight hundred and fifty-eight, all drafts or orders for the payment of any sum of money to the bearer on demand, which being drawn upon any banker, or any person or persons acting as a banker, and residing or transacting the business of a banker, within fifteen miles of the place where such drafts or orders are issued, are now exempt from stamp duty, shall be chargeable with the stamp duty of one penny for every such draft or order.*

After 24th May 1858, certain drafts to be chargeable with a stamp duty of 1d.

II. The duty by this Act granted shall be under the care and management of the Commissioners of Inland Revenue for the time being; and all the powers, provisions, and regulations, pains and penalties, contained in or imposed by any Act or Acts relating to any duties of the same kind or description payable in *Great Britain* and *Ireland* respectively, and in force at the time of the passing of this Act, shall respectively be in full force and effect with respect to the duty by this Act granted, and to the paper and instruments chargeable therewith, so far as the same are or shall be applicable, and shall be observed, applied, enforced, and put in execution for and in the collecting and securing of the said duty hereby granted, and otherwise in relation thereto, so far as the same shall be consistent with the express provisions of this Act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted with reference to the said duty by this Act granted.

* See 28 V. c. 15; *Sched.*

The duty to be under the care of the Commissioners of Inland Revenue. Powers and provisions of former Acts to apply to this Act.

21 AND 22 VICT. C. 47.—*An Act to amend the Law of False Pretences.*—[23d July 1858.] 21 & 22 V. c. 47.

WHEREAS it is expedient to amend the law relating to false pretences: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. If any person shall by any false pretence obtain the signature of any other person to any bill of exchange, promissory note, or any valuable security, with intent to cheat or defraud, every such offender shall

Any person obtaining signature to bill of exchange,

21 & 22 V. c.
47.

etc. by false
pretences
deemed guilty
of misde-
meanour.

21 & 22 V. c.
79.

be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be sentenced to penal servitude for the term of four years, or to suffer such other punishment by fine or imprisonment, or by both, as the Court shall award.

21 AND 22 VICT. C. 79.—*An Act to amend the Law relating to Cheques or Drafts on Bankers.*—[2d August 1858.]

WHEREAS it is expedient to amend the law relating to cheques or drafts on bankers: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The crossing
to be deemed a
material part
of a cheque or
draft, etc.

I. Whenever a cheque or draft on any banker, payable to bearer, or to order, on demand, shall be issued, crossed with the name of a banker, or with two transverse lines with the words "and company" or any abbreviation thereof, such crossing shall be deemed a material part of the cheque or draft, and except as hereafter mentioned, shall not be obliterated or added to or altered by any person whomsoever after the issuing thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed, or if the same be crossed as aforesaid without a banker's name, to any other than a banker.

The lawful
holder of a
cheque un-
crossed, or
crossed "and
company,"
may cross the
same with the
name of a
banker.

II. Whenever any such cheque or draft shall have been issued uncrossed, or shall be crossed with the words "and company" or any abbreviation thereof, and without the name of any banker, any lawful holder of such cheque or draft, while the same remains so uncrossed, or crossed with the words "and company" or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and whenever any such cheque or draft shall be uncrossed, any such lawful holder may cross the same with the words "and company" or any abbreviation thereof, with or without the name of a banker; and any such crossing as in this section mentioned shall be deemed a material part of the cheque or draft, and shall not be obliterated or added to or altered by any person whomsoever after the making thereof; and the banker upon whom such cheque or draft shall be drawn shall not pay such cheque or draft to any other than the banker with whose name such cheque or draft shall be so crossed as last aforesaid.

Persons oblite-
rating, etc.
crossing with
intent to de-
fraud, guilty
of felony.

III. If any person shall obliterate, add to, or alter any such crossing with intent to defraud, or offer, utter, dispose of, or put off with intent to defraud, any cheque or draft on a banker, whereon such fraudulent obliteration, addition, or alteration has been made, knowing it to have been so made, such person shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or to such other punishment as is enacted and provided for those guilty of forgery of bills of exchange in the statute in that case made and provided.

IV. Provided always, that any banker paying a cheque or draft which does not at the time when it is presented for payment plainly appear to be or to have been crossed as aforesaid, or to have been obliterated, added to, or altered as aforesaid, shall not be in any way responsible or incur any liability, nor shall such payment be questioned by reason of such cheque having been so crossed as aforesaid, or having been so obliterated, added to, or altered as aforesaid, and of his having paid the same to a person other than a banker, or other than the banker with whose name such cheque or draft shall have been so crossed, unless such banker shall have acted *mala fide*, or been guilty of negligence in so paying such cheque.

21 & 22 V. c. 79.

Banker not to be responsible for paying a cheque which does not plainly appear to have been crossed or altered.

V. In the construction of this Act the word "banker" shall include any person or persons, or corporation, or joint stock company, acting as a banker or bankers.

Interpretation of the word "banker."

23 VICT. c. 15.—*An Act for granting to her Majesty certain Duties of Stamps.*
—[3d April 1860.]

23 V. c. 15.

Most Gracious Sovereign,

WE, your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of *Great Britain* and *Ireland* in Parliament assembled, towards raising the necessary supplies for defraying your Majesty's public expenses, and making a permanent addition to the public revenue, have freely and voluntarily resolved to grant unto your Majesty the duties herein-after mentioned; and do humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The stamp duties now payable in the United Kingdom of *Great Britain* and *Ireland* for or in respect of the several instruments, matters, and things mentioned or described in the schedule to this Act annexed, whereon other duties are by this Act granted, shall respectively cease and determine, and shall be and the same are hereby repealed; provided that the stamp duties now chargeable on any of the said instruments, matters, and things shall be payable in respect of such of them as shall have been or shall be made, signed, or dated at any time before the passing of this Act; save and except that the stamp duties on foreign bills of exchange by this Act granted shall be payable on all such bills as shall, after the passing of this Act, be first negotiated, or, if not negotiated, paid in the United Kingdom.

Duties on instruments described in schedule repealed.

II. [*New duties as set forth in schedule granted.*]

III. [*Provisions of former Acts to apply.*]

XII. Whenever any bill of exchange, draft, or order having thereon an adhesive stamp shall be presented for payment, the person to whom the same shall be presented shall, upon paying the same, write or impress or cause to be written or impressed upon every stamp affixed to the bill the word "paid," to the end that the stamp may be more effectually

The payers of bills of exchange, etc. to cancel stamps. See 24 & 25 V. c. 91, § 33.

28 V. c. 15.
In default,
penalty L.20.
The stamps on
foreign bills to
be adhesive.
The provisions
of 17 & 18
Vict. c. 88. to
be applied.

cancelled, and made incapable of being used again ; and in default of so doing he shall forfeit the penalty of twenty pounds.

XIII. The duties by this Act granted upon or in respect of bills of exchange, drafts, or orders, drawn out of the United Kingdom, shall be denoted by adhesive stamps, in like manner as the duties now payable on bills of exchange drawn out of the United Kingdom ; and all the clauses, provisions, directions, regulations, penalties, and forfeitures contained in the Act passed in the seventeenth and eighteenth years of her Majesty's reign, chapter eighty-three, relating to adhesive stamps on bills of exchange drawn out of the United Kingdom, as well as in this Act, so far as the same are applicable, shall be applied and put in force in respect of the stamp duties on bills of exchange by this Act granted, as fully and effectually as if the same were herein repeated and re-enacted.

SCHEDULE REFERRED TO IN THIS ACT.

Bill of Exchange, Draft, or Order, for the payment of money exceeding £4000, now chargeable with the stamp duty of £2, 5s. ;
For every £1000 or part of £1000 of the money thereby made payable, £0 10 0

Bill of Exchange (Foreign) drawn in a Set of Three or more for the payment of money exceeding £4000, where every bill of the set is now chargeable with the stamp duty of fifteen shillings ;
Every bill of the set, for every £1000 or part of £1000 of the money thereby made payable, 0 3 4

Bill of Exchange, Draft, or Order (Foreign) drawn or endorsed out of the United Kingdom for the payment of money on demand,

The same duty as on an inland bill of exchange for the payment of money otherwise than on demand, according to the amount thereby made payable.

All bills, drafts, or orders for the payment by any banker or person acting as a banker of any sum of money, though not made payable to the bearer or to order, and whether delivered to the payee or not ; and all writings or documents entitling or intended to entitle any person whatever to the payment from or by any banker or person acting as a banker of any sum of money, whether the person to whom payment is to be made shall be named or designated therein or not, or whether the same shall be

delivered to him or not, shall respectively be deemed to be bills, drafts, or orders for the payment of money chargeable with stamp duty, as if the same had been made payable to bearer or to order.*

Provided always, that any one document or writing, although directing the payment of several sums of money to different persons, shall be chargeable with stamp duty as one order only.

23 V. c. 15.

* See 23 & 24
V. c. 111, § 18.

Exemptions.

Any draft or order drawn by any banker upon any other banker, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

Any letter written by a banker to any other banker directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf; and all warrants or orders for the payment of any annuity granted by the Commissioners for the Reduction of the National Debt, or for the payment of any dividend or interest on any share in the Government or parliamentary stocks or funds, and all drafts or orders drawn by the Accountant-General of the Court of Chancery in England or Ireland, shall be exempt from all stamp duty.

23 AND 24 VICT. C. 111.—*An Act for granting to Her Majesty certain Duties of Stamps, and to amend the Laws relating to the Stamp Duties.*—[28th August 1860.] 28 & 24 V. c. 111.

I. [*After passing of this Act the duties described in schedule to be charged.*]

II. [*Stamp duties now payable on instruments, etc., mentioned in schedule repealed.*]

IV. [*Provisions of former Acts to apply to this Act.*]

V. The duties by this Act granted on promissory notes made or purporting to be made out of the United Kingdom shall be denoted by adhesive stamps, to be provided by the Commissioners of Inland Revenue for the purpose, or by any stamps of sufficient amount which shall have been provided for denoting the duties on bills of exchange made out of the United Kingdom; and the proper adhesive stamp for denoting the duty on any such note shall be affixed thereon, and be cancelled at the same time and times, and in like manner as is provided by the fifth section of an Act passed in the seventeenth and eighteenth years of her present Majesty, chapter eighty-three, and the twelfth section of an Act

The duties on foreign promissory notes to be denoted by adhesive stamps.

23 & 24 V. c.
111.

Bankers may
affix stamps
to drafts or
orders drawn
on them.

Sect. 18 of 55
Geo. 3. c. 184,
prohibiting the
issuing of
bankers' notes
with printed
dates, repealed.

Drafts on
bankers for
less than 20s.
to be lawful.

passed in the present session, chapter fifteen, in the case of bills of exchange therein respectively mentioned, and under the like penalties respectively for any neglect thereof; and the said respective sections shall be read as if the same were inserted in this Act expressly in reference to the promissory notes aforesaid, and the duties by this Act granted thereon, as well as to the bills of exchange therein respectively mentioned.

XVIII. Where any draft or order for the payment of money by any banker or person acting as a banker, chargeable with the stamp duty of one penny, shall come to the hands of such person unstamped, it shall be lawful for him to affix thereto the necessary adhesive stamp, and to cancel the same in manner by law required, and upon so doing to make the payment thereby directed, and to charge the duty in account against the person who ought to have paid the same, or to deduct such duty from the sum so directed to be paid; and such draft or order shall, so far as relates to the stamp duty chargeable thereon, be good and valid; but this shall not relieve any person from the liability to the penalty he may have incurred by issuing the said draft or order unstamped.

XIX. Whereas by the eighteenth section of the Act passed in the fifty-fifth year of the reign of King *George* the Third, chapter one hundred and eighty-four, the issuing of promissory notes payable to bearer on demand with printed dates therein is prohibited, and such prohibition is an unnecessary restriction: Be it enacted, That the said section of the said last-mentioned Act shall be and is hereby repealed: Provided always, that, notwithstanding anything in any Act of Parliament contained to the contrary, it shall be lawful for any person to draw upon his banker, who shall *bona fide* hold money to or for his use, any draft or order for the payment, to the bearer or to order on demand, of any sum of money less than twenty shillings.

SCHEDULE REFERRED TO IN THIS ACT.

Promissory Note made in the United Kingdom for the Payment of any Sum of Money exceeding £4000.

For every £1000 or part of £1000 of the money
thereby made payable, £0 10 0

Foreign Promissory Note made or purporting to be made out of the United Kingdom for the Payment within the United Kingdom of any Sum of Money,

{ The same
duty as on an
inland bill of
exchange for
the payment
otherwise
than on de-
mand of
money of the
same amount.

24 AND 25 VICT. C. 91.—*An Act to amend the Laws relating to the Inland Revenue.*—[6th August 1861.]

24 & 25 V. c.
91.

XXV. In lieu of the stamp duties now payable on protests and other notarial acts there shall be paid the duties following ; that is to say,
Protest of any bill of exchange or promissory note, where the stamp duty on the bill or note does not exceed one shilling,
Protest of any other bill of exchange or promissory note, and protest of any other kind, and other notarial act whatsoever, £0 1 0
And for every sheet or piece of paper, parchment, or vellum upon which the same shall be written, after the first, a further progressive duty of 0 1 0

Stamp duties in lieu of those now payable on protests and other notarial acts.

XXVIII. [*Stamp duties to be collected under the laws in force.*]

XXXIII. In any case where an adhesive stamp used for denoting any stamp duty is required by law to be cancelled by any person, by writing thereon his name or the name of his firm, it shall be sufficient if, instead of the name in full, the initials thereof shall be so written, or shall be stamped or impressed in ink thereon, together with any other particulars specially required by law to be written thereon, provided that by means thereof the stamp shall be effectually obliterated and cancelled, so as not to admit of its being used again, anything in any Act to the contrary notwithstanding ; and where the adhesive stamp on any foreign bill or promissory note shall, on such bill or note being received by any person who shall be or become the *bona fide* holder thereof, be effectually obliterated, and shall purport and appear to be duly cancelled, the same shall, so far as relates to such holder, be deemed to be sufficiently cancelled : Provided that where any such bill or note when so received by any such person as last aforesaid shall have affixed thereto a proper and sufficient adhesive stamp, but such stamp shall not be duly cancelled, it shall be competent to the holder to cancel the same as if he were the person first negotiating the bill or note ; and upon his so doing such bill or note shall be deemed to be duly stamped, and shall be as valid and as available by such holder and any prior or subsequent holder as it would have been if the stamp had been affixed and cancelled as by law required by the first holder, anything in any Act to the contrary notwithstanding ; but nothing herein contained shall relieve any person who ought to cancel such stamp from any penalty incurred by not cancelling the same as required by law.

Mode of cancelling adhesive stamps.

25 AND 26 VICT. C. 89.—*An Act for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations.*—[7th August 1862.]

25 & 26 V. c.
89.

WHEREAS it is expedient that the laws relating to the incorporation, regulation, and winding-up of trading companies and other associations should be consolidated and amended : Be it therefore enacted by the

25 & 26 V. c.
89.

Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title.

I. This Act may be cited for all purposes as "The Companies Act, 1862."

Publication of
name by a
limited com-
pany.

XLI. Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

Penalties on
non-publica-
tion of name.

XLII. If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall be liable to the like penalty ; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorizes the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorizes the issue of any notice, advertisement, or other official publication of such company, or signs or authorizes to be signed on behalf of such company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

Promissory
notes and bills
of exchange.

XLVII. A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company.

Service of
notices on
company.

LXII. Any summons, notice, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter, addressed to the company, at their registered office.

26 AND 27 VICT. C. 105.—*An Act to remove certain Restrictions on the Negotiation of Promissory Notes and Bills of Exchange under a limited Sum.*— [28th July 1863.] 26 & 27 V. c. 105. —

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. From and after the passing of this Act, the Act passed in the seventeenth year of the reign of King *George* the Third, chapter thirty, and so much and such part and parts of any other Act or Acts as continue or revive the said Act, or as prohibit or restrain, or impose any penalty for or on account of the publishing, uttering, or negotiating in *England* of any promissory or other note, not being a note payable to bearer on demand, bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of twenty shillings, or above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, made, drawn, or endorsed in any other manner than as directed by the said Act of the seventeenth year aforesaid, and also the seventeenth section and schedules (C.) and (D.) of an Act passed in the eighth and ninth years of Her Majesty's reign, chapter thirty-eight, requiring or directing that all such notes, bills, drafts, or undertakings as aforesaid which shall be issued in *Scotland* shall be made, drawn, or endorsed according to the forms contained in the said schedules respectively, shall be and the same is and are hereby repealed.

17 G. 3. c. 30, etc., restraining negotiation in *England* of notes and bills for a limited sum, and sect. 17 and schedules (C.) and (D.) of 8 & 9 Vict. c. 38, restraining negotiation in *Scotland* of like notes, etc., repealed.

II. This Act shall continue in force for three years, and until the end of the then next ensuing session of Parliament. Term of Act.

27 AND 28 VICT. C. 56.—*An Act for granting to Her Majesty certain Stamp Duties; and to amend the Laws relating to the Inland Revenue.*—[25th July 1864.] 27 & 28 V. c. 56.

II. Any bill of exchange payable on demand, which shall be endorsed out of the United Kingdom, or purport to be so endorsed, wheresoever the same may have been drawn, shall, for the purpose of charging the stamp duty thereon, be deemed to be a foreign bill of exchange, but shall be chargeable with the same amount of stamp duty as an inland bill of exchange for the payment of money otherwise than on demand, according to the amount thereby made payable; and the provisions, regulations, and penalties contained in the fifth section of the Act passed in the seventeenth and eighteenth years of Her Majesty's reign, chapter eighty-three, shall be deemed to apply to any such bill so endorsed or purporting to be endorsed as aforesaid as if the same were a bill drawn out of the United Kingdom.

Bills of exchange payable on demand and endorsed abroad to be deemed foreign bills.

II. FORMS.

I. FORMS OF BILLS AND PROMISSORY-NOTES.

Bills, etc.

1. Foreign Bill.

London, 21st January 1865.

Exchange for 10,000 francs.

At two usances, (*or at sight, or on demand, or* after sight, *or at*
after date,) pay this my first bill of exchange, (second and
third of the same tenor and date not paid,) at your place of business,
Street, Paris, to Messrs E. F. or order, (or bearer,) ten
thousand francs (*a*), value received of them in (*b*), and place
the same to account, as *per* advice, (*or with or without further advice*),
from
To C. D., Merchant } A. B.
in Paris. } C. D.

2. Inland Bill.

L.50.

Edinburgh, 21st January 1865.

Three months after date, (*or* after sight, *or at sight, or on*
demand,) pay to me, or order, (*or to* or order, *or to*
bearer,) at the head office of the National Bank here, the sum of fifty
pounds sterling, value received.
To C. D., Merchant } A. B.
in Edinburgh. } C. D.

3. Bill payable by Instalments.

L.500.

Edinburgh, 21st January 1865.

At three, six, and nine months after date, by equal instalments, pay
to me, or my order, (*or to* or order, *or to bearer*), at your
warehouse in Street, Edinburgh, the sum of five hundred
pounds sterling, for value received.
To Mr C. D., Merchant } A. B.
in Edinburgh. } C. D.

(a) The rate of exchange may be stated here if thought advisable. received (whether in cash, in goods, or to account, or in any other way)
(b) As the French Code de Commerce (Art. 110) and other foreign laws require the nature of the value to be stated, it will be advisable always to insert it.

4. *Promissory-Note.*

Bills, etc.

L.100.

Edinburgh, 2d February 1865.

One day after date, (or on demand, or at the term of Whitsunday next,) I promise to pay to A. B., or order, within the
 here, the sum of one hundred pounds sterling, value
 received. C. D.

5. *Letter of Credit by a Bank on their Branch or Correspondent.*

SIR,

Edinburgh, 2d February 1865.

You will please to honour the drafts of to the extent
 of on account of the Bank.

I am, Sir, your most obedient servant,

*To the Agent for }
 the Bank. }*

6. *Bank Check (a).*

L.10.

Edinburgh, 2d February 1865.

Pay to or bearer, ten pounds sterling, on account
 of

*To the Banking Co., }
 Edinburgh. }*

A. B.

No. 47.

7. *Draft to Order on Demand.*

L.100.

Edinburgh,

1865.

On demand pay to James Thomson, or order, one hundred pounds
 sterling, which charge to me. SAMUEL MACKAY.

*To the National Bank of Scotland, }
 Edinburgh. }*

II. FORMS OF INDORSEMENTS.

1. *Blank Indorsement.*

Indorsements.

The payee simply signs his name across the back, thus:—

“JAMES THOMSON.”

(a) Crossing (*antea*, pp. 118, 634) is done either by drawing two transverse lines across the check, and writing the words “and company,” or an abbreviation of them, or by writing the name of any banker across it.

Indorsements.2. *Special Indorsement.*

“ Pay to Messrs Henry Dawson and Co., Lanark (a).

JAMES THOMSON.”

3. *Indorsement by Procuration.*

“ Per procuration of James Thomson.

MATTHEW JARDINE.”

4. *Restrictive Indorsement securing Proceeds to Indorser.*

“ Pay to William Mackay for my use.

JAMES THOMSON.”

5. *Restrictive Indorsement preventing further Negotiability.*

“ Pay to William Mackay only.

JAMES THOMSON.”

6. *Qualified Indorsement, preventing Recourse.*

JAMES THOMSON, *without recourse.*

7. *Indorsement of Foreign Bill.*

“ Pay to William Mackay or order, value received in merchandise.
Edinburgh, 2d January 1865.

JAMES THOMSON.” (b)

III. PROTESTS AND ACTS OF HONOUR.

Protests.1. *Protest of a Bill for Non-acceptance.*

L.100 sterling.

Edinburgh, 20th January 1865.

Three days after sight, pay to B., or order, at the head office of the

(a) The words “ or order ” are not necessary to enable the indorsers to indorse again (*ante*, p. 183).

(b) For a similar reason to that stated, p. 642, note b, it is advisable

to set forth in the indorsement of a foreign bill the nature of the value received, and also to make the indorsement special, and to date it.

Commercial Bank of Scotland here, the sum of one hundred pounds sterling, for value of	(Signed) A.	Protests. —
(Addressed) <i>To C., Merchant</i> }		
<i>in Edinburgh.</i> }		
	(Signed) A.	
(Indorsed thus :) Pay the contents to D., or order.	(Signed) B.	

At Edinburgh, the twentieth day of January, one thousand eight hundred and sixty-five years.

The principal bill above copied was, in the personal presence of the above-named C., (or "at the dwelling-house of the above-named C.," as the case may be,) duly protested by me, notary-public subscribing, at the instance of D., merchant in Edinburgh, the last indorsee, not only against the said C., on whom the same is drawn for non-acceptance, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned, for interest, damages, and expenses, (or in case of a bill payable at a different place or country from that where it was drawn, for exchange, re-exchange, interest, damages, and expenses,) as accords; in presence of E. and F., witnesses specially called to the premises.

Attestor,
G., N. P.

2. Protest of the foregoing Bill for Non-payment.

(Prefix copy of the bill as before.)

At Edinburgh, the twenty-sixth day of January, one thousand eight hundred and sixty-five years.

Which day, I, notary-public subscribing, at the request of the above-named indorsee D., passed to the head office of the Commercial Bank, Edinburgh, where the principal bill above copied is payable, and there, after exhibiting and reading over the same, I represented that it had now become due since the date of the protest taken thereupon for non-acceptance on the 20th current, and demanded payment of the contents thereof; which demand not being complied with, I duly protested the said bill at the instance of the said indorsee, not only against the said C., for non-payment of the contents, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned for interest, damages, and expenses, (or "for exchange, re-exchange, interest, damages, and expenses,") as accords, in presence of, etc.

3. Protest for Non-acceptance and Non-payment, when the Bill has not been separately presented for Non-acceptance.

L.100.

Edinburgh, 12th May 1864.

Three months after date, pay to me, or my order, at your warehouse,

it is drawn, for exchange, re-exchange, interest, damages, and expenses, as accords;) in presence of, etc. (a)

Protesta.
—

5. *Protest on a Promissory-Note.*

L.100 sterling.

Edinburgh, 12th May 1864.

Three months after date, I promise to pay to A., merchant in Edinburgh, or order, at the Royal Bank of Scotland, St Andrew's Square here, one hundred pounds sterling, for value received.

(Signed) B.

At Edinburgh, the twentieth day of August, one thousand eight hundred and sixty-four.

The principal promissory-note above copied was, where payable, (or if no place of payment is mentioned, in the personal presence, or at the dwelling-house of the said B., farmer in F.), duly protested by me, notary-public subscribing, at the instance of A., therein designed, to whom the same is payable, against the said granter, for non-payment of the contents, and for interest, damages, and expenses, as accords; in presence, etc.

6. *Act of Honour, whereby a Bill is accepted by the Drawee under protest, to be written on the protest, with a copy of the Bill prefixed.* Acts of Honour.

Thereafter the same day, in presence of me, the said notary-public, appeared the said C., who declared, that notwithstanding he would not accept the said bill in the form in which it was drawn to be placed to account of B., yet he would accept the same under protest for honour, and on account of A. the indorser, and protested that the said A., and also the said B., the drawer, should be bound to him, jointly and severally, for his reimbursement in due form of law, in presence of the said witnesses.

G., N.P.

This form can be easily varied, according as the bill is accepted by some other party than the drawee, or for the honour of the drawer, or any of the indorsers.

7. *Act of Honour in paying a Bill.*

Thereafter the same day, in presence of me, the said notary-public, appeared F., merchant in Edinburgh, who offered to pay the contents of the said bill to the said E., the holder thereof, for honour and on account of the said A., underwriter in London, one of the indorsers of the same; and having paid the same accordingly, he protested that the said acceptor and drawer of the said bill, and the said A., should remain jointly and

(a) The form of protest for non-payment of a draft or order on a banker does not differ from the protest on an unaccepted bill.

appeared A., merchant in Edinburgh, who declared, day of _____ last, he left for acceptance, according to custom, with B., merchant there, a bill, dated the _____ after date, and indorsed to the said A., A. had repeatedly sent to get back the same, accepted (if the bill has fallen due, say, or to receive payment without success; wherefore he required me to demand the contents thereof,) and, in default, to protest in upon I passed to the dwelling-place of the said B., and (mention the person,) I demanded delivery of the said bill accepted, (or if it had fallen due, or payment of the sum which demand I received for answer, (state the answer I, the said notary-public, at the request foresaid, have against the said B., and the drawer of the said bill, as may concern, for non-acceptance and not delivery fallen due, for non-payment) of the said bill, and for change, interest, damages, and expenses, as accords. tested in presence of, etc.

IV. EXTRACT REGISTERED PROTEST

Extracts.

1. *Extract Registered Protest from the Books of Council and Session to one Defender.*

At Edinburgh, the _____ day of _____ thousand eight hundred and sixty, in presence of the _____ and Session, appeared Mr George Monro, advocate, pro _____ and gave in the protest under the same might be registered in their Lordships' book which desire the said Lords found reasonable, and order to be done accordingly, whereof the tenor follows: (Has

repeated *brevitatis causa*, and that to the said A. B., within six days if within Scotland, within forty days if within Orkney or Shetland, and if furth of Scotland within twenty-one days next after he is charged to that effect, under the pain of poinding and imprisonment, and also grant warrant to arrest the said C. D., his readiest goods, gear, debts, and sums of money in payment and satisfaction of the said sum and interest, and if he fail to obey the said charge then to poind his readiest goods, gear, and other effects, and, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places in form as effeirs. Extracted on these two pages by [either of the principal or one of the assistant keepers of the Register of Deeds, Probative Writs, and Instruments of Protest, who respectively hold a commission from the Lord Clerk Register of Scotland, in terms of the Act 1 & 2 Geo. IV. cap. 38].

2. *Extract Registered Protest from the Books of Council and Session applicable to two or more Defenders.*

At Edinburgh, the day of , in the year one thousand eight hundred and sixty , in presence of the Lords of Council and Session, compeared Mr George Monro, advocate, procurator for A. B., and gave in the protest underwritten, desiring the same might be registered in their Lordships' books conform to law; which desire the said Lords found reasonable, and ordained the same to be done accordingly, whereof the tenor follows: (*Here copy the protest.*)

And the said Lords grant warrant to messengers-at-arms in her Majesty's name and authority to charge the said C. D. and E. F. personally or at their respective dwelling-places, if within Scotland, and if furth thereof by delivering copies of charge at the office of the Keeper of the Record of Edictal Citations at Edinburgh, conjointly and severally to make payment of the foresaid sum of pounds shillings and pence, and the legal interest thereof since due and till paid, all in terms and to the effect contained in the decree and extract above written and here referred to, and held as repeated *brevitatis causa*, and that to the said A. B., within six days if within Scotland, within forty days if within Orkney or Shetland, and if furth of Scotland, within twenty-one days next after they are respectively charged to that effect, under the pain of poinding and imprisonment, and also grant warrant to arrest the said C. D. and E. F., their readiest goods, gear, debts, and sums of money in payment and satisfaction of the said sum and interest, and if they fail to obey the said charge then to poind their readiest goods, gear, and other effects, and, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places in form as effeirs. Extracted on these two pages by (*see end of first form of extract*).

3. *Extract Registered Protest from the Books of Council and Session applicable to Company and Individual Partners.*

At Edinburgh, the day of in the year one thousand eight hundred and sixty , in presence of the Lords of

DAYS OF GRACE AND USANCES.

			Days of Grace.
Berlin,	Abolished by the Code of Exchange (a),	none.	
Brazil,	Rio de Janeiro, Bahia, etc.,	15 days.	
Dantzic,	.	10 days.	
England and Wales,	.	3 days.	
France,	Abolished by the Code Napoleon,	none.	
Frankfort on the Maine,	Abolished by the Code of Exchange,	none.	
Genoa,	Abolished by the Code Napoleon,	none.	
Hamburgh,	Abolished by the Code of Exchange,	none.	
Ireland,	.	3 days.	
Leghorn,	.	none.	
Lisbon and Oporto,	15 days on local, and six on foreign bills ; but if not previously accepted, must be paid on the day they fall due,	6 days or 15 days.	
Palermo,	.	none.	
Petersburgh,	Bills drawn after date are entitled to 10 days' grace, those drawn at sight to only 3 days, and those at any number of days after sight to none. But bills received and presented after they are due, are nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holidays, as also the day when the bill falls due ; on which days they cannot be protested for non-payment, but, on the morning of the last day of grace, payment must be demanded, and, if not complied with, the bill must be protested before sunset,	10 days, 3 days, etc.	
Rotterdam,	Abolished by Code Napoleon,	none.	
Scotland,	.	3 days.	
Spain,	Vary in different parts of Spain—generally 14 days on foreign, and 8 on inland bills. At Cadiz only 6 days' grace. When bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace, nor any bills, unless accepted prior to maturity,	14 days, but vary.	

(a) Allgemeine deutsche Wechselordnung, art. 33. Days of grace having been abolished in the German empire, and in the countries which have adopted the Code Napoleon, it may be worthy of consideration whether what form only a source of confusion should be longer retained in the United Kingdom. As an illustration of the mode in which they produce

Days of Grace.	Trieste,	3 days on bills drawn after date, or any term after sight, not less than 7 days, or payable on a particular day, but bills presented after maturity must be paid within twenty-four hours. Sundays and holidays are included in the days of grace ; and if the last day of grace fall on such a day, payment must be made, or the bill protested on the first following open day,	3 days.
	Venice,	6 days, exclusive of Sundays, holidays, and the days when the bank is shut,	6 days.
	Vienna,	Abolished by the Code of Exchange,	none.

Periods of Usance. 2. *Periods of Usance allowed between different Countries of Europe.*

Usance between	(sometimes accounted	1 calendar month
London and	{ as treble usance, is }	after date.
Aleppo,		
Altona is		1 calendar month after date.
America, North,		said to be sixty days after sight (a).
Amsterdam,		1 calendar month after date.
Antwerp,		1 do. do.
Berlin,		14 days after acceptance.
Bilboa,		2 calendar months after date.
Brabant,		1 do. do.
Bruges,		1 do. do.
Cadiz,		2 calendar months after date.
Constantinople		
and Smyrna,		31 days do.
Dantzic,		14 days after acceptance.
Flanders,		1 calendar month after date.
France,		30 days do.
Frankfort on the		
Maine,		14 days after acceptance.
Florence,	{ sometimes accounted	30 days after
	{ as treble usance, }	date.
Genoa (b),		3 calendar months after date.
Hamburgh,		1 do. do.
Holland,		1 do. do.

confusion, reference may be made to a case (reported after much of the preceding volume had been printed) where it was held that a bill indorsed during the days of grace was not to be considered as indorsed after the term of payment, to the effect of rendering the indorsee liable to exceptions pleadable against the indorser (*Brown v. Bain*. 3 June 1864, 2 Macph. 1143).
(a) M'Culloch's Commercial Dictionary.
(b) Stated in Molloy as 2 months after date.

sance between				Periods of Usance.
London and	Leghorn,	3	calendar months	after date.
	Lisbon,	2	do.	do.
	Lisle,	1	do.	do.
	Lucca, sometimes,	3	do.	do.
	Malta,	30	days	after date.
	Middleburgh,	1	calendar month	after date.
	Milan,	3	do.	do.
	Palermo,	3	do. or 90 days	do.
	Petersburgh,	none.		
	Portugal,	2	calendar months	after date.
	Paris,	1	do.	do.
	Rotterdam,	1	do.	do.
	Rome,	3	do.	do.
	Rouen,	1	do.	do.
	Spain,	2	do.	do.
	Trieste,	same as	Vienna.	
	Venice,	3	calendar months	after date.
	Vienna,	14	days	after acceptance.
	West Indies,	31	do.	do.
	Zante,	3	calendar months	after date.
	Zealand,	1	do.	do.

Usance between	
Amsterdam and	Brabant, France, Flanders, and Holland or Zealand, 1 calendar month.
	Italy, Spain, and Portugal, 2 calendar months.
	Frankfort, Nuremburgh, Vienna, and other places in Germany, on Hamburgh and Breslau, 14 days after sight, 2 usances, 28 days, and half usance, 7 days (a).

(a) In Germany it is no longer com-
 ment to draw bills payable at usances
gemeine deutsche Wechselordnung,
 4). In France it is still competent
le de Commerce, art. 129). The
 e given above is given with some
 tation, as the times do not seem to
 precisely determined. The tables

given in Chitty, in M'Culloch's Com-
 mercial Dictionary, in Tate's Modern
 Cambist, in Beawes, and in Dupuis de
 la Serra, all differ more or less. The
 truth seems to be, that the practice
 of drawing bills at usances, though
 at one time universal, is now almost
 unknown.



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ERRATA.

Page 48, note (*d*), for "1836," read "1856."

Page 80, line 20, for "sec. 17," read "sec. 18."

Page 119, note (*f*), for "18 L. J. (Q. B.) 575," read "20 L. J. (Q. B.) 270."

Page 148, note (*c*), add "*London Joint-Stock Bank v. Stewart and Co.*, 15 July 1859, 21 D. 1327."

Page 188, note (*a*), for "c. 3," read "c. 83."

Page 201, note (*c*), add "See *Brown v. Bain*, cited note (*a*), pp. 651, 652."

Page 203, note (*c*), for "*Stange*," read "*Strange*."

Page 231, note (*i*), for "*Ashfield*," read "*Aspitel*," and add "33 L. J. (Q. B.) 328."

Page 241, lines 13, 14, for "Thus an indorser who," read "Thus when an indorser."

Page 296, note (*b*), for "376," read "249."

Page 316, note (*c*), for "sec. 598," read "sec. 13."

Page 324, lines 5, 10, for "drawer," read "drawee."

Page 338, note (*d*), for "*Tarries*," read "*Farrier*."

Page 417, line 26, for "was previously," read "is."

Page 437, note (*h*), for "1681, c. 36," read "1681, c. 20."

THE END.

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